



*ATROCITY CRIMES LITIGATION YEAR-IN-REVIEW (2011) CONFERENCE*  
*Center for International Human Rights*  
*Northwestern University School of Law*  
*The Hague*  
*Wednesday, March 14, 2012*

1           MR. SCHEFFER: We're waiting for the judgment  
2 any moment now, and then we're going to watch it and  
3 then have some discussion about it in real time. I  
4 wish I had you all over at the ICC at this moment,  
5 but I don't; I have you here, and so we're just going  
6 to get formally started. People will continue to  
7 float in through the security net here.

8                       Welcome to everyone. Welcome  
9 particularly to all of the students.

10                      Professor Stahn, where are your  
11 students? There they are. The Leiden Brigade is  
12 here. Okay. Welcome.

13                      I want to thank in particular -- I'm  
14 David Scheffer, the Director of the Center for  
15 International Human Rights at Northwestern University  
16 School of Law in Chicago. We sponsor this event  
17 every year. I think this is the fifth year running  
18 that we've had this, maybe the sixth, I can't keep  
19 count anymore, and a tremendous amount flows from  
20 this day's event. We create a video record of it, we  
21 post that record on the web site; we create a  
22 transcript.

23                      Our Northwestern Journal of  
24 International Human Rights then publishes a special  
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1 edition in the summer that has contributed articles  
2 to it as well as an abridged transcript of this  
3 event. And the new editor-in-chief, Phil Sandick, is  
4 with us today -- Phil, raise your hand -- and he is a  
5 second-year student at Northwestern Law and the joint  
6 JD/LLM program that we have in international human  
7 rights law, and he has helped prepare this event.

8 I also want to thank in advance  
9 Gregory Townsend, Acting Chief of Prosecutions here  
10 at the Special Tribunal for Lebanon. I believe  
11 that's right; is that correct?

12 MR. MORLEY: Maybe in April, but it's Ian who  
13 is acting as chief --

14 MR. SCHEFFER: Oh. Oh, Ian, I am so -- Ian,  
15 forgive me. I know that people are out of the  
16 office, and I misspoke, Ian, so I'm -- I apologize.

17 Gregory, thank you so much for all of  
18 the logistical help that you afforded us today to  
19 help put this together.

20 I also want to thank in advance  
21 Virginia Richardson, who is my legal assistant back  
22 in Chicago, for all of the help that she has  
23 provided, and I want her name on the record for this  
24 event.

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1                   We have a very distinguished group of  
2 panelists today. This is going to be a discussion.  
3 No one's delivering a speech. I'm going to moderate  
4 it. I'm going to first introduce everyone, and then  
5 I will commence with questions that are pertinent to  
6 the jurisprudence and practice of the major  
7 International Criminal Tribunals during the calendar  
8 year 2011. There will be some questions that slip  
9 into 2012, because there have been some significant  
10 events in 2012 that we need to be cognizant of and  
11 take note of.

12                   So we will have a few little points of  
13 discussion, particularly with respect to the  
14 Extraordinary Chambers in the Courts of Cambodia, an  
15 important judgment that came down on Trial Number 1,  
16 and, of course, we have the Lubanga decision  
17 forthcoming in a moment or so.

18                   Let me just quickly go through our  
19 panelists. We have Professor Diane Amann, who is the  
20 distinguished academic commentator for this event.  
21 She is -- by the way, everyone has their bios, the  
22 bios of everyone, in front of you, so I'm not going  
23 to go through all of that detail, as much as I would  
24 like to. But because I'm going to get a screen here  
25

1 any second, I'll just go through everyone's name.

2 She is the Emily and Ernest Woodruff  
3 Chair in International Law at the University of  
4 Georgia School of Law, a longtime colleague of mine,  
5 and also a very proud alumnus of Northwestern  
6 University School of Law.

7 We have Caroline Buisman, who is the  
8 Defense Consultant, works a lot on International  
9 Criminal Court matters and specializes in  
10 international criminal law, consulting with defense  
11 counsel.

12 Andrew Cayley, who is the  
13 International Co-Prosecutor of the Extraordinary  
14 Chambers in the Courts of Cambodia, is with us today,  
15 all the way from Phnom Penh. He has recently  
16 received the honor of QC in the British legal system,  
17 which means he's at the top of the pyramid now.  
18 Congratulations, Andrew.

19 Sara Criscitelli, who is the  
20 Prosecution Coordinator at the International Criminal  
21 Court, and who gave up her seat in the courtroom  
22 today to be with us. This is her case, Lubanga.

23 MS. CRISCITELLI: No.

24 MR. SCHEFFER: Well, sort of, it is. Yeah. I

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1 mean, yeah, of course it is.

2           Yeah. Let's shoot it up. We'll  
3 continue a little bit later with everyone else. Is  
4 it coming on or are they just coming in? Okay. It  
5 just takes a minute.

6           While we're waiting, Fidelma Donlon,  
7 the Deputy Registrar of this court, the Special Court  
8 for Sierra Leone, with considerable experience with  
9 other particular tribunals.

10           And Mark Harmon -- I'm going to stop  
11 the moment you tell me to. Okay. I'm going to stop.

12           (WHEREUPON, Judge Adrian Fulford  
13 ruled via videotape as follows:)

14           JUDGE FULFORD: "Trial Chamber I ('Trial  
15 Chamber' or 'Chamber') of the International Criminal  
16 Court ('Court' or 'ICC), in the case of Prosecutor  
17 versus Thomas Lubanga Dyilo ('Lubanga case'), issues  
18 the following Summary of the 'Judgment pursuant to  
19 Article 74 of the Statute':

20           "This is the summary of the Chamber's Judgment  
21 under Article 74 of the Rome Statute as to whether  
22 the Prosecutor has proved the guilt of the accused;

23           "On the 29th of January 2007, the Pre-Trial  
24 Chamber issued its Decision on the Confirmation of

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1 Charges. The Pre-Trial Chamber confirmed that there  
2 was sufficient evidence to establish substantial  
3 grounds to believe that:

4 "Thomas Lubanga Dyilo is responsible, as  
5 co-perpetrator, for the charges of enlisting and  
6 conscripting children under the age of fifteen years  
7 into the FPLC and using them to participate actively  
8 in hostilities within the meaning of  
9 articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute  
10 from early September 2002 to the 2nd of June 2003.

11 "Additionally, the Pre-Trial Chamber confirmed  
12 that there was sufficient evidence to establish  
13 substantial grounds to believe that:

14 "Thomas Lubanga Dyilo is responsible, as  
15 co-perpetrator, for the charges of enlisting and  
16 conscripting children under the age of fifteen years  
17 into the FPLC and using them to participate actively  
18 in hostilities within the meaning of  
19 articles 8(2)(e)(viii) and 25(3)(a) of the Statute  
20 from the 2nd of June to the 13th August 2003.

21 "Pursuant to Article 19 of the Statute, the  
22 'Court shall satisfy itself that it has jurisdiction  
23 in any case brought before it.' The Democratic  
24 Republic of the Congo ('DRC') became a State party on  
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1 the 11th of April 2002, and, pursuant to Article 14  
2 of the Statute, President Kabila referred the  
3 situation in the DRC to the Prosecutor in March 2004.  
4 Pre-Trial Chamber I concluded that the case falls  
5 within the Court's jurisdiction, and the Appeals  
6 Chamber confirmed the Pre-Trial Chamber's Decision on  
7 the accused's challenge to the jurisdiction of the  
8 Court. The personal, temporal, territorial and  
9 subject-matter elements that are relevant to the  
10 Court's jurisdiction have not altered since the  
11 Decision on the Confirmation of Charges, and the  
12 issue has not been raised by the parties or any State  
13 before the Trial Chamber.

14 "The first status conference before the Trial  
15 Chamber was held on the 4th of September 2007, and  
16 thereafter there were 54 status conferences prior to  
17 the commencement of the trial. The following is a  
18 summary of the main procedural events which had a  
19 significant impact on the course of the proceedings.

20 "The trial was stayed twice as a consequence  
21 of disclosure issues. The first stay was imposed by  
22 the Chamber on the 13th of June 2008, and it was  
23 lifted on the 18th of November 2008. A second stay  
24 was imposed on the 8th of July 2010. The



1 presentation of evidence resumed on the 25th of  
2 October 2010.

3 "The parties and the legal representatives of  
4 victims made their opening statements on the 26th and  
5 27th of January 2009. The prosecution called its  
6 first witness on the 28th of January 2009. The  
7 prosecution's oral evidence concluded on the 14th of  
8 July of 2009.

9 "On the 3rd of September 2009, the Chamber  
10 adjourned the presentation of evidence pending an  
11 interlocutory appeal. The Appeals Chamber issued its  
12 judgment on the matter on the 8th of December 2009  
13 and the evidence resumed on the 7th of January 2010.

14 "The defence presented a bifurcated case. In  
15 the first part the defence in essence called into  
16 question the testimony of all the prosecution's child  
17 soldier witnesses, a process that included the  
18 presentation of rebuttal witnesses by the  
19 prosecution. On the 10th of December 2010, the  
20 defence filed an application seeking a permanent stay  
21 of the proceedings. The Chamber issued a Decision  
22 dismissing the defence application on the 23rd of  
23 February 2011.

24 "The second part of the defence evidence was  
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1 introduced thereafter and on the 20th of May of 2011,  
2 the presentation of evidence was formally closed.

3 "The Trial Chamber heard 67 witnesses, and  
4 there were 204 days of hearings. The prosecution  
5 called 36 witnesses, including 3 experts, and the  
6 defence called 24 witnesses. Three victims were  
7 called as witnesses following a request from their  
8 legal representatives. Additionally, the Chamber  
9 called four experts. The prosecution submitted 368  
10 items of evidence, the defence, 992; and the legal  
11 representatives, 13, (1373 in total). In addition to  
12 the written submissions, the oral closing arguments  
13 of the parties and participants were heard on the  
14 25th and 26th of August of 2011. Since the 6th of  
15 June of 2007, when the record of the case was  
16 transmitted to the Trial Chamber, the Chamber has  
17 delivered 275 written decisions and orders and 347  
18 oral decisions.

19 "In accordance with Article 68(3) of the  
20 Statute, victims have participated in the case, and  
21 in particular they have applied to introduce  
22 evidence, they have questioned witnesses and they  
23 have advanced written and oral submissions with the  
24 leave of the Chamber and with the assistance of their  
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1 legal representatives. The total number of  
2 individual victims authorised to participate in the  
3 proceedings is 129 (34 female and 95 male victims).

4 "At the request of the accused and in  
5 accordance with Article 76(2) of the Statute, the  
6 Chamber in an oral Decision ruled that there would be  
7 a separate sentencing hearing if the accused is  
8 convicted.

9 "The Trial Chamber heard the testimony of  
10 several expert witnesses and it reviewed documentary  
11 evidence that relates to the existence of an  
12 inter-ethnic conflict in Ituri between 1999 and 2003.

13 "Against this background, the Union des  
14 Patriotes Congolais ('UPC') was created on the 15th  
15 of September of 2000. Although Thomas Lubanga was  
16 one of the UPC's founding members and its President  
17 from the outset, the nature of the group when it was  
18 created is a matter of dispute in this case. These  
19 topics are analysed in greater detail below when the  
20 Chamber deals with the individual criminal  
21 responsibility of the accused.

22 The UPC and its military wing, the Force  
23 Patriotique pour la Liberation du Congo ('FPLC'),  
24 took power in Ituri in September of 2002.

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1           "Under Article 66 of the Statute, the accused  
2 is presumed to be innocent until the Prosecutor has  
3 proved his guilt. For a conviction, each element of  
4 the crime charged must be established 'beyond  
5 reasonable doubt'.

6           "An issue that occupied the Chamber for a  
7 significant part of this trial concerned the use by  
8 the prosecution of local intermediaries in the DRC.  
9 The Chamber is of the view that the prosecution  
10 should not have delegated its investigative  
11 responsibilities to the intermediaries as analysed in  
12 the judgment, notwithstanding the extensive security  
13 difficulties that it faced. A series of witnesses  
14 have been called during this trial whose evidence, as  
15 a result of the essentially unsupervised actions of  
16 three of the principal intermediaries, cannot be  
17 relied on.

18           "The Chamber spent a considerable period of  
19 time investigating the circumstances of a substantial  
20 number of individuals whose evidence was, at least in  
21 part, inaccurate or dishonest. The prosecution's  
22 negligence in failing to verify and scrutinise this  
23 material sufficiently before it was introduced led to  
24 significant expenditure on the part of the Court. An  
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1 additional consequence of the lack of proper  
2 oversight of the intermediaries is that they were  
3 potentially able to take advantage of the witnesses  
4 they contacted. Irrespective of the Chamber's  
5 conclusions regarding the credibility and reliability  
6 of the alleged former child soldier witnesses, given  
7 their youth and likely exposure to conflict, they  
8 were vulnerable to manipulation.

9 "The Chamber has withdrawn the right of six  
10 dual status witnesses to participate in the  
11 proceedings, as a result of the Chamber's conclusions  
12 as to the reliability and accuracy of these  
13 witnesses.

14 "Likewise, the Chamber has not relied on the  
15 testimony of the three victims who testified in Court  
16 (a/0225/06, a/0229/06, and a/0270/07), because their  
17 accounts are unreliable. Given the material doubts  
18 that exist as to the identities of two of these  
19 individuals, which inevitably affect the evidence of  
20 the third, the Chamber decided to withdraw the  
21 permission originally granted to them to participate  
22 as victims.

23 "The Chamber has concluded that there is a  
24 risk that intermediaries P-0143, P-316 and P-321  
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1 persuaded, encouraged, or assisted witnesses to give  
2 false evidence. These individuals may have committed  
3 crimes under Article 70 of the Statute. Pursuant to  
4 Rule 165 of the Rules, the responsibility to initiate  
5 and conduct investigations in these circumstances  
6 lies with the prosecution. Investigations can be  
7 initiated on the basis of information communicated by  
8 a Chamber or any reliable source. The Chamber  
9 communicates the relevant information to the OTP, and  
10 the Prosecutor should ensure that the risk of a  
11 conflict of interest is avoided for the purposes of  
12 any investigation.

13 "Although the Pre-Trial Chamber in its  
14 Confirmation of Charges Decision determined that for  
15 part of the relevant period the conflict was  
16 international in character, the Chamber concludes  
17 that the UPC/FPLC, as an organised armed group, was  
18 involved in an internal armed conflict against the  
19 Armee Populaire Congolaise ('APC') and other Lendu  
20 militias, including the Force de Resistance  
21 Patriotique en Ituri ('FRPI'), between September 2002  
22 and the 13th of August of 2003. Accordingly,  
23 applying Regulation 55 of the Regulations of the  
24 Court, the Chamber has changed the legal

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1 characterisation of the facts to the extent that the  
2 armed conflict relevant to the charges was  
3 non-international in character.

4 "The charges against the accused include three  
5 distinct criminal acts. The Chamber has concluded  
6 that the crimes of conscription and enlistment are  
7 committed at the moment a child under the age of 15  
8 is enrolled into or joins an armed force or group,  
9 with or without compulsion. These offences are  
10 continuous in nature. They end only when the child  
11 reaches 15 years of age or leaves the force or group.

12 "As regards the offence of using children  
13 under the age of 15 to participate actively in  
14 hostilities, the Chamber has concluded that this  
15 includes a wide range of activities, from those  
16 children on the front line (who participate directly)  
17 through to the boys or girls who are involved in a  
18 myriad of roles that support the combatants. All of  
19 these activities, which cover either direct or  
20 indirect participation, have an underlying common  
21 feature: the child concerned is, at the very least, a  
22 potential target. The decisive factor, therefore, in  
23 deciding if an 'indirect' role is to be treated as  
24 active participation in hostilities is whether the

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1 support provided by the child to the combatants  
2 exposed him or her to real danger as a potential  
3 target. In the judgment of the Chamber these  
4 combined factors - the child's support and this level  
5 of consequential risk - mean that although absent  
6 from the immediate scene of the hostilities, the  
7 individual was nonetheless actively involved in them.

8 "It is alleged that the accused, jointly with  
9 others, conscripted and enlisted children under the  
10 age of 15 years into the armed group of the UPC/FPLC  
11 and that he used them to participate actively in  
12 hostilities between the 1st of September of 2002 and  
13 the 13th of August of 2003.

14 "The Chamber has concluded that the UPC/FPLC  
15 was an armed group.

16 "The Chamber finds that between the 1st of  
17 September of 2002 and the 13th of August of 2003, the  
18 armed wing of the UPC/FPLC was responsible for the  
19 widespread recruitment of young people, including  
20 children under the age of 15, on an enforced as well  
21 as a 'voluntary' basis.

22 "Multiple witnesses testified credibly and  
23 reliably that children under 15 were 'voluntarily' or  
24 forcibly recruited into the UPC/FPLC and sent to  
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1 either the headquarters of the UPC/FPLC in Bunia or  
2 its military training camps, including at Rwampara,  
3 Mandro, and Mongbwalu. Video evidence clearly shows  
4 recruits under the age of 15 in the Rwampara camp.

5 "The evidence demonstrates that children in  
6 the military camps endured harsh training regimes and  
7 were subjected to a variety of severe punishments.  
8 The evidence also establishes that children, mainly  
9 girls, were used by UPC/FPLC commanders to carry out  
10 domestic work. The Trial Chamber heard evidence from  
11 witnesses that girl soldiers were subjected to sexual  
12 violence and rape. Witnesses specifically referred  
13 to girls under the age of 15 who were subjected to  
14 sexual violence by UPC/FPLC commanders. Sexual  
15 violence does not form part of the charges against  
16 the accused, and the Chamber has not made any  
17 findings of fact on the issue, particularly as to  
18 whether responsibility is to be attributed to the  
19 accused.

20 "The evidence has established beyond  
21 reasonable doubt that children under the age of 15  
22 were conscripted and enlisted into the UPC/FPLC  
23 forces between the 1st of September 2002 and the 13th  
24 of August of 2003.

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1           "The testimony of multiple witnesses and the  
2 documentary evidence have demonstrated that children  
3 under the age of 15 were within the ranks of the  
4 UPC/FPLC between the 1st of September 2002 and the  
5 13th of August 2003. The evidence proves that  
6 children were deployed as soldiers in Bunia, Tchomia,  
7 Kasenyi, Bogoro and elsewhere, and they took part in  
8 fighting, including at Kobu, Songolo and Mongbwalu.  
9 It has been established that the UPC/FPLC used  
10 children under the age of 15 as military guards. The  
11 evidence reveals that a special 'Kadogo Unit' was  
12 formed, which was comprised principally of children  
13 under the age of 15. The evidence of various  
14 witnesses, as well as video footage, demonstrates  
15 that commanders in the UPC/FPLC frequently used  
16 children under the age of 15 as bodyguards. The  
17 accounts of several witnesses, along with the video  
18 evidence, clearly prove that children under the age  
19 of 15 acted as bodyguards or served within the  
20 presidential guard of Mr. Lubanga.

21           "In all the circumstances, the evidence has  
22 established beyond reasonable doubt that children  
23 under the age of 15 were used by the UPC/FPLC to  
24 participate actively in hostilities between the 1st  
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1 of September 2002 and the 13th of August 2003.

2 "The Chamber has concluded that pursuant to  
3 Articles 25(3) (a) and 30 of the Statute, the  
4 prosecution must prove in relation to each charge  
5 that:

6 "First, there was an agreement or common plan  
7 between the accused and at least one other  
8 co-perpetrator that, once implemented, will result in  
9 the commission of the relevant crime in the ordinary  
10 course of events;

11 "Second, the accused provided an essential  
12 contribution to the common plan that resulted in the  
13 commission of the relevant crime;

14 "Third, the accused meant to conscript, enlist  
15 or use children under the age of 15 to participate  
16 actively in hostilities or he was aware that by  
17 implementing the common plan these consequences 'will  
18 occur in the ordinary course of events';

19 "Fourth, the accused was aware that he  
20 provided an essential contribution to the  
21 implementation of the common plan; and

22 "Fifth, the accused was aware of the factual  
23 circumstances that established the existence of an  
24 armed conflict and the link between these

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1 circumstances and his conduct.

2 "The evidence has confirmed that the accused  
3 and his co-perpetrators agreed to, and participated  
4 in, a common plan to build an army for the purpose of  
5 establishing and maintaining political and military  
6 control over Ituri. In the ordinary course of  
7 events, this resulted in the conscription and  
8 enlistment of boys and girls under the age of 15, and  
9 their use to participate actively in hostilities.

10 "The Chamber has concluded that from late 2000  
11 onwards, Thomas Lubanga acted with his  
12 co-perpetrators, who included Floribert Kisembo,  
13 Bosco Ntaganda, Chief Kahwa, and commanders  
14 Tchaligonza, Bagonza and Kasangaki. Mr. Lubanga's  
15 involvement with the soldiers (including young  
16 children) who were sent to Uganda for training is of  
17 significance. Although these events fall outside the  
18 period covered by the charges and are outwith the  
19 temporal jurisdiction of the Court, they provide  
20 evidence on the activities of this group, and they  
21 help establish the existence of the common plan  
22 before and throughout the period of the charges.

23 "The accused was in conflict with Mr. Mbusa  
24 Nyamwisi and the RCD-ML from at least April of 2002,

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1 and he led a group that sought to bring about  
2 political change in Ituri, including the removal of  
3 Mr. Mbusa Nyamwisi by force, if necessary. The  
4 accused remained in control, by delegated authority,  
5 whilst he was detained during the summer of 2002 and  
6 he sent Chief Kahwa and Mr. Beiza to Rwanda to obtain  
7 arms. During that period, Floribert Kisembo, Bosco  
8 Ntaganda and Chief Kahwa, three of the accused's  
9 principal alleged co-perpetrators, were generally  
10 responsible for recruitment and training, which  
11 included girls and boys under the age of 15.

12 "The accused and at least some of his  
13 co-perpetrators were involved in the takeover of  
14 Bunia in August 2002. Thomas Lubanga, as the highest  
15 authority within the UPC/FPLC, appointed Chief Kahwa,  
16 Floribert Kisembo and Bosco Ntaganda to senior  
17 positions within the UPC/FPLC. The evidence has  
18 established that during this period, the leaders of  
19 the UPC/FPLC, including Chief Kahwa, and Bosco  
20 Ntaganda, and Hema elders such as Eloy Mafuta, were  
21 active in mobilisation drives and recruitment  
22 campaigns in order to persuade Hema families to send  
23 their children to join the UPC/FPLC. Those children  
24 recruited before the formal creation of the FPLC were

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1 incorporated into that group and a number of military  
2 training camps were added to the original facility at  
3 Mandro. The Chamber has concluded that between the  
4 1st of September 2002 and the 13th of August 2003, a  
5 significant number of high-ranking members of the  
6 UPC/FPLC and other personnel conducted a large-scale  
7 recruitment exercise directed at young people,  
8 including children under the age of 15, on both  
9 voluntary and coercive bases.

10 "The Chamber is satisfied beyond reasonable  
11 doubt that as a result of the implementation of the  
12 common plan to build an army for the purpose of  
13 establishing and maintaining political and military  
14 control over Ituri, boys and girls under the age of  
15 15 were conscripted and enlisted into the UPC/FPLC  
16 between the 1st of September 2002 and the 13th of  
17 August 2003. Similarly, the Chamber is satisfied  
18 beyond reasonable doubt that the UPC/FPLC used  
19 children under the age of 15 to participate actively  
20 in hostilities including during battles. They were  
21 used, during the relevant period, as soldiers and as  
22 bodyguards for senior officials including the  
23 accused.

24 "Thomas Lubanga was the President of the  
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1 UPC/FPLC, and the evidence demonstrates that he was  
2 simultaneously the Commander-in-Chief of the army and  
3 its political leader. He exercised an overall  
4 coordinating role as regards the activities of the  
5 UPC/FPLC. He was informed, on a substantive and  
6 continuous basis, of the operations of the FPLC. He  
7 was involved in the planning of military operations,  
8 and he played a critical role in providing logistical  
9 support, including providing weapons, ammunition,  
10 food, uniforms, military rations and other general  
11 supplies to the FPLC troops. He was closely involved  
12 in making decisions on recruitment policy and he  
13 actively supported recruitment initiatives, for  
14 instance by giving speeches to the local population  
15 and the recruits. In his speech at the Rwampara  
16 military training camp -- once again, in his speech  
17 at the Rwampara military camp, he encouraged children  
18 including those under the age of 15 years, to join  
19 the army and to provide security for the populace  
20 once deployed in the field after their military  
21 training. Furthermore, he personally used children  
22 below the age of 15 amongst his bodyguards and he  
23 regularly saw guards of other UPC/FPLC staff members  
24 who were below the age of 15. The Chamber has

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1 concluded that these contributions by Thomas Lubanga,  
2 taken together, were essential to a common plan that  
3 resulted in the conscription and enlistment of girls  
4 and boys below the age of 15 into the UPC/FPLC and  
5 their use to actively participate in hostilities.

6 "The Chamber is satisfied beyond reasonable  
7 doubt, as set out above, that Thomas Lubanga acted  
8 with the intent and knowledge necessary to establish  
9 the charges (the mental element required by  
10 Article 30). He was aware of the factual  
11 circumstances that established the existence of the  
12 armed conflict. Furthermore, he was aware of the  
13 nexus between the said circumstances and his own  
14 conduct, which resulted in the conscription,  
15 enlistment and use of children below the age of 15 to  
16 participate actively in hostilities.

17 "Although Judges Odio Benito and Fulford have  
18 written separate and dissenting opinions on  
19 particular discrete issues, the Chamber has reached  
20 its decision unanimously.

21 "The Chamber concludes that the prosecution  
22 has proved beyond reasonable doubt that Mr. Thomas  
23 Lubanga Dyilo is guilty of the crimes of conscripting  
24 and enlisting children under the age of fifteen years  
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1 into the FPLC and using them to participate actively  
2 in hostilities within the meaning of  
3 Articles 8(2)(e)(vii) and 25(3)(a) of the Statute  
4 from early September 2002 to the 13th of August 2003.

5 "An order relating to the future steps in this  
6 case will be issued a little later today Mr. Lubanga  
7 will remain in custody.

8 "That concludes this hearing."

9 (WHEREUPON, Videotape concluded.)

10 MR. SCHEFFER: Let us reconvene in the  
11 aftermath of that historic initial judgment by the  
12 International Criminal Court.

13 Just to repeat, I'm Dave Scheffer, for  
14 those of you who have entered in the interim, from  
15 Northwestern University School of Law. I want to  
16 sort of repeat my thanks, but in a more institutional  
17 way, to the Special Tribunal for Lebanon for granting  
18 us this space today. It is a very generous gift,  
19 shall we say, by the tribunal for the sake of this  
20 educational exercise, and we at Northwestern are  
21 extremely grateful, and thanks again to Gregory  
22 Townsend and Daryl Mundis initially as well for  
23 helping arrange this.

24 I was in the middle before of

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1 introducing everyone, and I'm going to very quickly  
2 just complete that list and not repeat those who I've  
3 already introduced.

4 Is there some -- I don't know what  
5 that beep is, but -- do we know what that is or --

6 MS. CRISCITELLI: That's me. They're sending  
7 a message on this.

8 MR. SCHEFFER: Oh, okay. Well, Sara, if we  
9 could complete that assignment. Yeah. Of course,  
10 Sara, we give her a break because she was one of the  
11 lawyers in the Lubanga case, so this is an exciting  
12 day.

13 I think I had just started to very  
14 briefly interview -- or introduce Mark Brian Harmon,  
15 who was the Senior Trial Prosecutor until very, very  
16 recently at the International Tribunal for the former  
17 Yugoslavia, and someone whom I'm extremely honored to  
18 be here with today, because Mark extends all the way  
19 back to the earliest deployment of lawyers and  
20 investigators to the Yugoslav Tribunal in 1994, and  
21 has just had a remarkable career here in The Hague,  
22 and I think having someone of that enormous  
23 experience with us today is going to be extremely  
24 beneficial.

25

1                   We also have the Chief Prosecutor of  
2 the International Criminal Tribunal for Rwanda,  
3 Hassan Jallow, who also over the last decade has made  
4 an enormous mark with the Rwanda Tribunal, and,  
5 before that, with the Special Court for Sierra Leone  
6 as a judge, and I just want to say how honored I am  
7 once again, Hassan, for you to be with us in this  
8 annual conference of Northwestern Law.

9                   And, finally, Iain Morley, the Senior  
10 Trial Counsel of the Special Tribunal for Lebanon,  
11 but also, as I understand it, Iain, I hope I get this  
12 right, sort of in an acting capacity in the  
13 prosecution office as head of prosecutions at this  
14 time. You can correct me if I'm wrong about that. I  
15 know that we're in a transitional phase right now at  
16 the tribunal, and you're probably wearing several  
17 hats, but we're extremely proud and pleased to have  
18 you with us today.

19                   I want to do the following to kick  
20 this off: As I said before, this is going to be a  
21 moderated discussion. We do this every year. There  
22 will be no speeches, including not even one at lunch.  
23 What we're going to do at lunch is -- believe it or  
24 not, we're not going to have a lunch speech this  
25

1 year. We're going to let everyone proceed to a  
2 location near the back there to be guided to an area  
3 to have lunch, and it will be on your own for the  
4 lunchtime so you could all talk to each other, et  
5 cetera, and then we will reconvene. I think we will  
6 break at 1:00 o'clock for lunch and come back, I  
7 think, at 2:00 o'clock; is that right, Greg? Yeah,  
8 we'll come back at 2:00, and we'll break at 4:30, and  
9 at 4:30, you will be given the privilege of  
10 visiting -- being given a guided tour of the  
11 courtroom here at the Special Tribunal.

12 This is the courtroom that has been  
13 used by the Special Court for Sierra Leone in the  
14 Charles Taylor case, and, in fact, the judgment in  
15 that case will be read out in that courtroom on April  
16 26th of this year, and, of course, it's also the  
17 courtroom, obviously, of the Special Tribunal for  
18 Lebanon, so I think it's worthwhile for you to take a  
19 look at it at 4:30.

20 I believe -- Greg, I just have to ask  
21 you this because I forgot beforehand, are they able  
22 to get coffee at any time by going down and getting a  
23 cup, or is that just at lunch? I just don't know the  
24 details on that.

25

1           MR. TOWNSEND: The coffee machine repairman is  
2 en route.

3           MR. SCHEFFER: Okay.

4           MR. TOWNSEND: And there's two pitchers of  
5 coffee, self-service, right now, for those who make  
6 it fastest down there.

7           MR. SCHEFFER: And how do they do that? Just  
8 go to the back and then down?

9           MR. TOWNSEND: Down to the Green -- lunch is  
10 in the Green Room downstairs.

11          MR. SCHEFFER: Can they bring their cup of  
12 coffee up here?

13          MR. TOWNSEND: Yes.

14          MR. SCHEFFER: All right. So, coffee, anytime  
15 you want to, just pitch out, get it, come back in,  
16 enjoy life, okay? But we're not going to have coffee  
17 breaks.

18                   And if any of the panelists on the  
19 panel would like a cup of coffee, I think the best  
20 thing is just to let me know and I'll volunteer  
21 someone to go get you a cup of coffee, okay? That's  
22 my duty. Okay. And, if necessary, we'll take a  
23 short break of five or ten minutes maybe around 11:40  
24 or so, okay? I know from the past that this stuff

25

1 goes very, very fast, and we have so much to cover.

2 Well, why don't we get started.

3 Before we discuss the Lubanga judgment that just came  
4 down, at least among our panelists, and particularly  
5 with Sara Criscitelli, who is with us today from the  
6 court, I want to ask Professor Amann to provide a  
7 little bit of an overview of some initial thoughts  
8 about the jurisprudence and practice of the tribunals  
9 in the year 2011, and, of course, she may have  
10 something to say about what she just heard on Lubanga  
11 as well, and that's fair game for her. She is our  
12 distinguished academic commentator, and I like to  
13 look to her as the fount of all wisdom as we proceed.

14 So, Diane, a few minutes of  
15 introduction?

16 MS. AMANN: Absolutely. Thank you so much,  
17 David, and I would like to give a shout-out to my  
18 fellow Northwesterners who are watching this from  
19 afar, and to thank in particular those students who  
20 volunteered to try to parse the jurisprudence in 2011  
21 of each of the various tribunals. That was a very  
22 difficult task, I'm sure, and the sheets that they  
23 gave us, trying to sort through that material, was  
24 invaluable for me in particular to prepare because I

25

1 have the task of trying to be current on what all the  
2 tribunals do, and at the risk of looking as if I'm a  
3 mad scientist, this is my crib sheet (indicating),  
4 and that gives you an idea of simply how complex this  
5 is.

6                   We have at this point six major  
7 tribunals operating, and I would submit there is a  
8 seventh, eighth, and ninth in operation or very  
9 shortly in operation. Why do I say that? We have  
10 the International Criminal Tribunal for the Former  
11 Yugoslavia, which this year celebrates its 20th  
12 anniversary, if we mark the date from the time of the  
13 first Security Council resolution that made  
14 combatants in the Balkan Wars aware that they would  
15 be held responsible for serious violations in  
16 international humanitarian law.

17                   That is certainly the date that David  
18 uses in his book, which I must commend to all of you  
19 early and often, "All the Missing Souls," which I  
20 have read with great interest and great edification.  
21 It really is international criminal justice's version  
22 of present at the creation.

23                   It tells us how the tribunals from the  
24 standpoint of foreign policy were established, and it  
25

1 really goes through all of them with the exception of  
2 the Special Tribunal for Lebanon. It talks about  
3 Yugoslavia in particular because that was the  
4 founding moment for the revival of international  
5 criminal justice.

6                   We have the International Criminal  
7 Tribunal for Rwanda, which 15 years ago this year  
8 looked to its first guilty plea, the first conviction  
9 entered by an International Criminal Tribunal since  
10 Nuremberg and Tokyo for an international crime, that  
11 was the guilty plea of the former prime minister of  
12 Rwanda, Kambanda; and the Akayesu trial, which, of  
13 course, we all know is the landmark in international  
14 criminal law began 15 years ago.

15                   We have the Extraordinary Courts for  
16 the Chambers -- the Extraordinary Chambers in the  
17 Courts of Cambodia -- Andrew, why do they all have to  
18 be C's in that acronym -- which 15 years ago had its  
19 beginning moment when the two co-prime ministers of  
20 Cambodia sent a letter to the United Nations  
21 secretary general saying, "We have the ability now to  
22 prosecute some former members of the Khmer Rouge, we  
23 would like to do it, will you help?"

24                   That began a very, very difficult,  
25



1 protracted, and still-continuing struggle to bring  
2 accountability in Cambodia through currently the  
3 mechanism of what's called the ECCC.

4           We have the Special Court for Sierra  
5 Leone, which ten years ago this year had its founding  
6 moment when the government of Sierra Leone signed an  
7 agreement with the United Nations establishing that  
8 tribunal.

9           We have the International Criminal  
10 Court, which this year celebrates its ten-year  
11 anniversary of entry into force of the Rome Statute  
12 of the International Criminal Court. It is the one  
13 tribunal, other than one I will mention in a moment,  
14 that anticipates being here for its 20th anniversary,  
15 ten years hence.

16           We have finally, among the ones that I  
17 think you would all have listed, the Special Tribunal  
18 for Lebanon, which five years ago this year saw the  
19 passage of the Security Council resolution that  
20 established the mechanisms to begin to establish this  
21 tribunal.

22           What are the other ones then? Well, I  
23 don't think that we can possibly omit, although it is  
24 not represented on this panel, the International  
25

1 Court of Justice, which is now 65 years old, and  
2 which increasingly in the last several years has  
3 itself become a mechanism for adjudication of  
4 international criminal law within the global system.

5 We have, of course, the verdicts --  
6 or, excuse me -- the judgments in the many cases  
7 arises out of allegations of genocide in the Balkan  
8 Wars, but at this very week, at this very moment, are  
9 being heard oral arguments in Senegal versus Belgium,  
10 which is a case involving a struggle over the efforts  
11 of Belgium to extradite the former dictator of Chad  
12 to stand trial for international crimes.

13 So I think we need to remember to keep  
14 that very important global justice mechanism within  
15 our view, even if it is not one that assesses  
16 individual criminal liability as the tribunals we're  
17 talking about do.

18 And then finally, what are those other  
19 two? We have very soon on the scene a new tribunal  
20 with the very unwieldy acronym of "Earkimt"?  
21 "Irmkimt"? I'm not sure. IRMCT, the International  
22 Residual Mechanism for the Criminal Tribunals. That  
23 is the body that will try to handle what's left of  
24 the jurisprudence or jurisdiction of the ICTR and the  
25

1 ICTY when they complete their live action cases.

2           Even though the tribunals will be done  
3 with their immediate trial work, of course, the  
4 defendants who were convicted will remain in jail,  
5 and so issues like early release or supervised  
6 release or parole or findings of new evidence, in  
7 some cases, some holdover appeals will be done by  
8 that mechanism. It will not handle any new trials,  
9 but it will have some operations, and we even now  
10 have staffing on that.

11           Judge Theodor Meron, who is also the  
12 president of the ICTY, has just been appointed, also  
13 the president of this closing mechanism tribunal, and  
14 Judge Daniel Nsereko -- I'm not sure how that's  
15 pronounced -- who is also an international judge on  
16 the tribunal, will be the president of the judicial  
17 mechanism within that.

18           Then, finally, as I understand it, the  
19 Special Court for Sierra Leone has its own what it  
20 will call an RSC, Residual Special Court, will handle  
21 some of the same kinds of philosophies, and  
22 presumably the other couple of ad hoc tribunals will  
23 be evolving those when the time is ripe.

24           Well, I'm not going to go through  
25

1 every judgment of every tribunal in the next three  
2 minutes, I couldn't possibly, and hopefully what was  
3 important in 2011 will be addressed and fleshed out  
4 over time.

5 Are there any common things that we  
6 can think about as we see some tribunals entering  
7 retirement, other ones as the ICC, the almost in  
8 their teen years at this point? I think we can see a  
9 constant trend of growing attention, growing  
10 aspirations, and growing expectations for the project  
11 of international criminal justice.

12 The son of the Shah of Iran has  
13 petitioned the International Criminal Court to pay  
14 attention to what he alleges are international crimes  
15 in Iran. For someone who grew up while the Shah of  
16 Iran himself was in power and remembers what was  
17 human rights and how unfulfilled aspirations of  
18 humans' rights were, how unadjudicated they were at  
19 the time that the Shaw himself was in power, it's  
20 astounding to me to think that his son is now turning  
21 to that mechanism.

22 But it's a signal of what seems to  
23 have happened just this last year, that suddenly the  
24 ICC in the global community has become rhetorically  
25

1 what the Supreme Court is in my country of the United  
2 States.

3           Young children know if something bad  
4 happens to them; they're hit by a kid on the  
5 playground or somebody is in the car accident and  
6 doesn't like the judgment that they get from the  
7 insurance adjustor, the rhetorical retort is, "I'm  
8 taking it all the way to the Supreme Court." It's a  
9 way of saying how angry you are, how wronged you  
10 feel, and how much you deserve justice.

11           We are beginning to see that with  
12 regard to the ICC. Often they may mean they want to  
13 go to the Special Court for Sierra Leone because  
14 nobody gets the jurisdictional issues, but there is a  
15 sense now that there's somewhere where we may get  
16 justice that didn't exist before. That seems to be a  
17 constant across the tribunals. I find it a very  
18 positive thing because with interest and awareness  
19 and expectations, becomes, one hopes, some results.

20           The concern, of course, is that  
21 international criminal justice doesn't always deliver  
22 on those results, and making that delivery happen is  
23 incredibly difficult. The dockets continue to grow,  
24 the resources continue to -- the need for them

25

1 continue to grow, the pies continue to shrink or be  
2 divided into other tribunals.

3 I should mention I have read just  
4 recently calls for an Arab ICC by no one less than  
5 Aryeh Neier of the Open Society Institute. There are  
6 calls within Congo for what they're calling a  
7 specialized mixed hybrid tribunal to deal with  
8 matters there. So there's a continuing word of  
9 proliferation; at the same time, there's a sense of  
10 convergence, because I think the real expectation is  
11 that, at one point, the ICC will be the place for  
12 that.

13 The push-pull of all that is  
14 fascinating and seems to have hit something of a  
15 watershed point this year in part because the UN  
16 Security Council is now interested in the  
17 International Criminal Court. It has referred a  
18 second case, a very difficult case, in Libya.

19 There appears to be movement greater  
20 than even there was two weeks ago toward a possible  
21 referral in Syria. And so we see even the elites,  
22 the P5 of the international community, suddenly  
23 interested in the project of international criminal  
24 justice and seeing it as a tool for its ends. That,

25

1 too, may have as many downsides as upsides.

2                   Finally, we see that we are getting  
3 more expressive indications that sometimes  
4 international criminal justice can deliver. I think  
5 what we just saw, Judge Fulford's reading of the  
6 summary of the verdict in Lubanga, was incredibly  
7 powerful. It was concise, it was cogent, it was  
8 clear.

9                   I suspect even in simultaneous  
10 translation, virtually everyone who listened  
11 understands that making children under -- my  
12 goodness -- 15 years of age kill other people is  
13 simply not permitted in the international community.  
14 And someone who is responsible for that, if he is  
15 identified, investigated, and prosecuted by  
16 international criminal justice, will be held  
17 responsible. That is the kind of message that is  
18 important to get out and that we are beginning to  
19 hear more often.

20                   We understand that Charles Taylor,  
21 Laurent Gbagbo, perhaps one day Bashar al-Assad, may  
22 have to answer in this world for what they have done  
23 to others. Those are good things.

24                   I would also add, and then I'm going  
25

1 to move it to the panels, that I think for me  
2 personally and for international criminal justice as  
3 a whole -- and I say "me personally" because my  
4 practice experience is criminal defense.

5           It was really important in the Lubanga  
6 judgment to hear the chastisement of certain behavior  
7 in the course of that prosecution, right? I would  
8 have been, and I suspect Sara was not happy to hear  
9 that, and know that there were millions of people  
10 listening to what was said about the conduct of the  
11 prosecution and what the judges felt was not  
12 tolerable and the fact that multiple witnesses'  
13 testimony was excluded from consideration in the  
14 development of the judgment.

15           But I find that a very healthy  
16 development, that the judges forthrightly  
17 acknowledged issues and demanded and recommended  
18 remedies for that. To me, that's a dynamic system  
19 that's moving in the right direction, and we should  
20 find that as encouraging as those of us, all of us,  
21 who care about human rights find encouraging a  
22 judgment against someone responsible for these kinds  
23 of crimes.

24           Thank you.

25



1           MR. SCHEFFER: Thank you, very much, Diane,  
2 for that excellent overview.

3                   I'd like to turn to Sara Criscitelli,  
4 if I could, since we just put her trial up on the  
5 screen here for a half hour, and just ask her if she  
6 has any particular reflections on the judgment that  
7 she's just heard from that trial. Sara?

8           MS. CRISCITELLI: I think that my first  
9 statement has got to be a disclaimer that I speak for  
10 me, not the court, not the OTP, the standard kind of  
11 stuff.

12           MR. SCHEFFER: Yes. And, in fact, Sara, let  
13 me interrupt. I'm so glad you reminded me. We all  
14 speak in our private capacities today, all of us,  
15 including myself, and I do want to put that marker  
16 firmly down. Thank you for reminding me.

17           MS. CRISCITELLI: Well, I don't actually care  
18 about anybody else, but that's okay.

19                   (WHEREUPON, there was laughter.)

20                   I have to say I have to read the  
21 decision, which I suspect is going to be several  
22 hundred pages. Overall, I think I'm comfortable with  
23 the judges. I think that these judges took it quite  
24 seriously, they were serious throughout the trial,  
25

1 they were serious in the deliberation, in the  
2 process.

3 As a personal matter, just based on  
4 what I know, which is not the universe obviously of  
5 the evidence or the facts in this case, but certainly  
6 with respect to the intermediaries, I think it may  
7 have been an overly harsh judgment, but I respect  
8 certainly the exercise of authority by the court. I  
9 think it is a good thing.

10 It does send a signal that this court  
11 is not sort of a kangaroo court, it's not in the  
12 pocket of the prosecution, it's not willing to  
13 tolerate any kind of measure. So, in that sense, I  
14 think it is a comfortable public statement.

15 Whether it's factually sustainable is  
16 another issue, but I don't -- you know, just based on  
17 what I know, I think it's harsh, at least as to one  
18 of the identified intermediaries, but that's a matter  
19 of quibbling with the facts, and I don't -- I'm not  
20 cognizant enough of them to say that for sure.

21 I think it has made good law in --  
22 although it may have some risks, but it has made good  
23 law in interpreting the use in hostilities. It is a  
24 very expansive notion that sweeps in children who

25

1 were not on the front lines and refuses to  
2 distinguish, and from -- in a certain respect from a  
3 human rights standpoint, that is a very good thing.

4 MR. SCHEFFER: Sara? Sara, may I just  
5 interrupt for a second?

6 MS. CRISCITELLI: Sure.

7 MR. SCHEFFER: Did you have any difficulty  
8 with the ruling, as I understand it, that this would  
9 only be regarded as an -- as a --

10 MS. CRISCITELLI: Internal --

11 MR. SCHEFFER: -- noninternational armed  
12 conflict? Did that complicate your --

13 MS. CRISCITELLI: No.

14 MR. SCHEFFER: -- finding of their judgment?

15 MS. CRISCITELLI: No. In fact, what we -- in  
16 our closing brief, we -- again, in my personal  
17 capacity and also my frequent ability to get things  
18 wrong, so don't take this as entirely gospel, but we  
19 did make an argument that even if there was an  
20 international conflict, broadly speaking, going on,  
21 this particular conflict was internal. So even if  
22 Rwanda or Uganda were involved somehow, this clash  
23 between the Hemas and the Lendus was not  
24 international.

25

1                   So we tried to distinguish and tried  
2 to say that you can't -- you need not have just one  
3 or the other. You can have internal conflicts within  
4 a context that has some international elements. I  
5 don't know if the decision goes into that.

6                   There's a law professor from  
7 Australia, who is very -- a leading light on these --  
8 the international law of war and conflicts, and he  
9 was a consultant with us and he developed this. So  
10 to the extent that the decision may mirror that, I  
11 think we're probably quite happy with it.

12                  MR. SCHEFFER: And can I also ask you, Sara,  
13 because we just have this hot off the wire here, of  
14 course: The court did make a very important finding  
15 regarding the indirect participation of children,  
16 that if they are found in that context, to become a  
17 potential target during their indirect work with the  
18 military arm, that they fall within then the  
19 jurisdiction of the court for purposes of the  
20 prosecution, if that, you know, if they're back in  
21 the camp --

22                  MS. CRISCITELLI: Right.

23                  MR. SCHEFFER: -- that indirect role, but then  
24 that sweeps them into the hostilities. Do you have

25

1 any comment on that?

2 MS. CRISCITELLI: I have to look at it. We  
3 talked about this obviously as a theory before we  
4 filed our briefs and before we litigated, and there  
5 are things to be said and also drawbacks, and I'm not  
6 sure -- I really would like to see how they  
7 articulate it before I comment, but there are  
8 concerns that if this person is actively involved in  
9 hostilities, then can that child be a legitimate  
10 target, for example, of another military force? You  
11 know, if we call this child a combatant for these  
12 purposes does that somehow strip the child of some  
13 protection? So there are these issues, but I would  
14 like to see how the decision actually comes to grips  
15 with it.

16 I think it came up because there was a  
17 lot of concern, particularly with respect to sexual  
18 abuse of most especially the girls, but not  
19 exclusively the girl soldiers, that if you don't --  
20 if you kind of dismiss that and say they're not used  
21 in hostilities, then you're somehow denigrating, or  
22 the attitude was that there's a possibility that you  
23 could be denigrating, what these girls were put  
24 through.

25

1                   And by elevating use in hostilities  
2 as, you know, possibly the worst that you can do,  
3 you're diminishing the suffering of -- and the truly  
4 legitimate and horrific suffering of the girls who  
5 become sex slaves or forced wives or, you know,  
6 whatever. So you have lots of concerns here, and I'd  
7 like to see how the decision addressed all of these.  
8 It's hard to tell in a ten-minute recitation.

9                   MR. SCHEFFER: Right. And just one final  
10 question, Sara, and then I'm going to ask another  
11 panelist. Was there any regret -- in light of what  
12 you just heard and what you've just said, was there  
13 any regret in not including sexual violence in the  
14 indictment against Lubanga?

15                   MS. CRISCITELLI: Not by me. You know, I  
16 can't speak for the office. I assume the office has  
17 no regret. It's complicated, and my person -- this  
18 is purely personal, this is before it came to the  
19 OTP. I was out with some friends who are very into  
20 some human rights and into the court and they were  
21 outraged by the indictment because it didn't include  
22 sexual abuse. And I looked at it and I said, "Look,  
23 I'm a prosecutor, and this is the first case, and  
24 from my standpoint, the first case should be  
25

1 confined, should be simple, and, you know, let's  
2 establish how the cases are brought." So knowing  
3 nothing about the facts, I was in favor of a clean,  
4 crisp, narrow indictment, and I would adhere to that  
5 now.

6 MR. SCHEFFER: Thank you very much, Sara. I  
7 would like to move on to prosecutor Hassan Jallow of  
8 the --

9 MR. HARMON: David?

10 MR. SCHEFFER: I'm sorry. Mark?

11 MR. HARMON: I'm sorry. Can I just make one  
12 observation --

13 MR. SCHEFFER: Yeah. Sure. Come on.

14 MR. HARMON: -- one comment on the decision  
15 that I saw? And that is, the judge chastising the  
16 prosecution for using intermediaries. I don't know  
17 the facts and circumstances of that, I don't know the  
18 impulse behind it, I don't intend to defend it. But  
19 I want to put into context what reality is like  
20 investigating these kinds of cases with little staff  
21 to do it.

22 Investigators have to go into areas of  
23 operation where war is ongoing, where there's  
24 conflict, where there's no infrastructure, and where  
25

1 there's no access to witnesses oftentimes, and the  
2 reality isn't as clear as sitting in this room,  
3 thinking, "This is a domestic police case where the  
4 police can respond to a crime scene, tape it off,  
5 have other processes that are developed." This is a  
6 raw, difficult process.

7 I can tell you that in the Srebrenica  
8 case that I prosecuted and Andrew prosecuted, in that  
9 case, the war was ongoing, there was a massacre. You  
10 know the facts, I won't relive and relate the facts,  
11 but I want to make a comparison. In the United  
12 States in 19 -- I want to say -- 68, there was a  
13 domestic terrorist attack on the Oklahoma federal  
14 court house that resulted in 168 deaths.

15 MR. SCHEFFER: 1998.

16 MR. HARMON: '98. Okay.

17 MR. SCHEFFER: Or, actually, '95, it was.

18 MR. HARMON: '95. Okay.

19 MR. SCHEFFER: Yeah, it was 1995. Yeah.

20 MR. HARMON: It resulted in about 168 deaths.

21 I read a Law Review article that said that the FBI in  
22 its first year had over 2,500 agents assigned to  
23 investigate that case.

24 Now, the Srebrenica case, which took  
25



1 place in 1995, while the war was ongoing, at the  
2 high-water mark, at the high-water mark, the number  
3 of investigators that were investigating that case  
4 for the Office of the Prosecutor was five.

5 So there are huge, complicated issues  
6 relating to locating witnesses, getting statements  
7 from witnesses, collecting evidence in a war zone  
8 that I think need to be understood. I'm interested  
9 to see the intermediary issue, I will read it myself,  
10 but I want to put it into the context, what the  
11 reality is like, actually rolling up your sleeves and  
12 having to do one of these cases.

13 Thank you.

14 MR. SCHEFFER: Caroline, you're looking at me.  
15 Did you want to jump in immediately? Yeah. So go  
16 ahead and jump in and then we'll get to Hassan.

17 (WHEREUPON, Disk 1 ended.)

18 Oh, we're rolling now. Okay.

19 Caroline Buisman?

20 MS. BUISMAN: Sorry to take the seat now; just  
21 because I'm working on the Katanga case and we have  
22 very similar issues with intermediaries, and I  
23 just -- I actually wanted to comment on what you just  
24 said.

25

1                   I think unlike in the ICTY where you  
2 had actually investigators, a lot of investigators,  
3 as you just pointed out, I think the ICC, and, I'm  
4 sorry, that's my point of view, I think they only  
5 rely on intermediaries, and, of course, they have  
6 their international investigators who go there from  
7 time to time, not very often, as you know, and I  
8 think it's a problem. They could actually employ the  
9 local investigators, which would really, really help.

10                   And it's not my experience that it's  
11 just so difficult and so dangerous to go to the  
12 terrain. I've been working in Tuli for four and a  
13 half years; I've never had a problem. I've been more  
14 to the crime scene than anyone from the prosecution.  
15 And so I do think this is a problem and it needs to  
16 be addressed, and I'm very happy that there was a  
17 very clear statement from the judge that this is just  
18 something that should not be repeated.

19                   At this moment, my feeling is that the  
20 ICC prosecution has actually taken the view that it's  
21 okay to rely on intermediaries, and this is not just  
22 in the Congo, this is in every conflict. And I think  
23 this really -- it just has to really change  
24 internally to actually get the idea that you really  
25

1 ha -- investigations are incredibly important.

2 Intermediaries, well, first of all,  
3 for a long time they are anonymous. Second of all,  
4 we don't know what transpires between the  
5 intermediaries and, actually, the witnesses, not just  
6 as -- not just in Lubanga, but we also have had many  
7 issues, and you just want to avoid it. You want to  
8 have transparency, and you want also -- there's also  
9 a problem of responsibility. So, in that sense, I  
10 think, it's much better to employ investigators.  
11 That's the one thing I wanted to say on that.

12 And just some more comments: The  
13 sex -- you know, what you were saying about the young  
14 girls under 15 -- of course, I also need to wait for  
15 the judgment, but I do think if we want to actually  
16 address it appropriately, then it needs to be  
17 charged. So this is for the prosecution then, I  
18 think, to charge that, because that's -- it's just --  
19 it's a separate crime altogether.

20 And, yeah, I'm a bit su -- does it  
21 work, actually (indicating microphone)? I'm a little  
22 bit surprised about the change of conflict because  
23 it's also something that we are facing. And until  
24 very recently, the prosecution has always taken the

25

1 view that it was an international armed conflict, and  
2 we are just facing this now. We're dealing with the  
3 brief and now we have a reclassification of the  
4 conflict in terms of it now being an internal  
5 conflict, so we will deal with that in our brief, but  
6 it's just something that comes as a bit of a surprise  
7 so late a day (sic).

8                   Yeah, I had one comment on the  
9 judgment, but, of course, I also have to read it, but  
10 I was a bit surprised about the standard of intent  
11 because -- yeah, and, again, this is very  
12 preliminary, but he was talking about the second limb  
13 of Article 30, so it's not actually the standard of  
14 meaning to engage in conduct, but to actually -- that  
15 it will happen in the ordinary course of events.

16                   So I'm not so sure how that works with  
17 recruitment of child soldiers because it's  
18 actually -- I would think it's a direct crime, so I  
19 would think it would actually make more sense if it  
20 was meaning to engage. But this is just a comment  
21 that I need to, of course, look up in the judgment.

22                   Thank you.

23                   MR. SCHEFFER: Thank you, Caroline, so much.  
24 And I just -- as always, I'm forgetting everything.

25

1 I do also want to formally thank all of my students  
2 back in Chicago who helped prepare all of the memos  
3 related to the preparation for this conference and  
4 which were circulated to our panelists here, a yeoman  
5 job, and one that I am deeply appreciative of.

6 Now, what I would like to do, you  
7 know, I think because of the way we've discussed  
8 this, if anyone else would like to make a comment  
9 about the Lubanga judgment that they've just heard,  
10 perhaps we should do that right now before I move on  
11 to other cases. Does anyone else wish to have a  
12 comment on Lubanga?

13 Yes, Diane, did you want to say  
14 something?

15 MS. AMANN: I just wanted to sort of footnote  
16 something on the decision about whether the use of  
17 force in which the UPC, the militia, of this  
18 defendant, was involved was a use of force within the  
19 context of either an international or an internal,  
20 also called a noninternational armed conflict.  
21 That's something to pay attention to, because for  
22 those of you who are interested at all in the  
23 interventions and counterterrorism operations that  
24 the United States has been involved in, because one

25

1 of the very difficult things about figuring out which  
2 legal regimes apply when you're trying to figure out  
3 status of detainees, propriety of targeting, et  
4 cetera, is what kind of conflict is at issue, in what  
5 kind of conflict is this one person detained part of?

6                   And just as we see that now in the  
7 DRC-Great Lakes conflict that was going on in the  
8 early 2000s, a judgment that there may have been both  
9 internal and international armed conflicts going on  
10 vis-a-vis different parties at the same time, that  
11 seems to be where the literature is going with the  
12 U.S. interventions.

13                   It makes adjudication and assignment  
14 of responsibility profoundly difficult in these  
15 cases, and so it's interesting to see the ICC now  
16 stepping its toe in a very muddy body of water.

17                   MR. SCHEFFER: Thank you, Diane.

18                   Anyone else? Lubanga?

19                   (WHEREUPON, there was no  
20 response.)

21                   No?

22                   I'm going to move on to Prosecutor  
23 Jallow of the International Criminal Tribunal for  
24 Rwanda.

25

1                   Hassan, one of your major judgments  
2     this year was the Butare judgment, a ten-year journey  
3     for your tribunal. And with several defendants  
4     involved, including Pauline Nyiramasuhuko, the first  
5     woman ever convicted on a genocide charge, could you  
6     talk to us about the Butare case and the judgment a  
7     bit and the significance of that particular  
8     conviction of Pauline?

9                   MR. JALLOW: You're right. It's been a  
10    ten-year journey for Butare basically because it's --  
11    it involves the largest number of accused we've ever  
12    had together in a joint trial at the ICTR, six  
13    accused, quite a number of counts, I think almost  
14    close to 40, 38 or 40 counts, with so many other  
15    particulars, and when you have that like body of  
16    accused, of course, it has an impact on the  
17    proceedings in times of scheduling, times of  
18    examination of witnesses, et cetera. All that takes  
19    a very long time.

20                   Plus the fact that it's -- the chamber  
21    had to deal with so many interlocutory matters, over  
22    1500 interlocutory motions and interlocutory appeals  
23    in that case alone. And at the end of the day, the  
24    Trial chamber had a transcript of close to 130,000

25

1 pages to go over in two years in order to be able to  
2 write a judgment. I think all these things together  
3 made sure that it was a prolonged trial.

4           From that case and the other  
5 multiple-accused trials we did, the lesson we drew  
6 was to stop any further multiple-accused cases at the  
7 ICTR. Since then, we've always gone with  
8 single-accused trials. So since 2003, we did not  
9 file any more multiple-accused trials, and we did a  
10 lot more single-accused cases within the same period  
11 than we could actually accomplish through the  
12 multiple-accused system. Other tribunals may, of  
13 course, have different experiences.

14           But it's significant also, as I say,  
15 in the area of sexual violence. It featured the only  
16 lady, the only woman, I would say, who was indicted  
17 by the tribunal, Pauline Nyiramasuhuko, with her son,  
18 Ntahobali, for sexual violence, among other counts.  
19 She was convicted of genocide and also crimes against  
20 humanity, rape as a crime against humanity under  
21 Article 6(3), Responsibility.

22           And, again, as it turns it out, the  
23 evidence then discloses while the trial is going on,  
24 that she actually ordered the commission of rapes.

25



1 But then because she had not been indicted for that,  
2 the Trial chamber could only convict her on the basis  
3 of 6(3), Responsibility. It's the sort of problem  
4 that prosecutors come up with in the course of these  
5 trials, your evidence discloses something a little  
6 bit more serious than you had originally thought, and  
7 there is no way of getting the judges to allow you to  
8 amend your indictment to bring it in line with the  
9 evidence because they are faced with completion  
10 strategy deadlines. They want to get the case over  
11 and done, over and finished, as quickly as possible.

12 It's significant because she was  
13 convicted of rapes as a crime against humanity,  
14 although the evidence disclosed her ordering the  
15 commission of rapes. It's significant also that  
16 she's a woman who was convicted of sexual violence  
17 against other women, and I think it indicates that  
18 that sort of offense does not have any gender  
19 boundaries. It can be committed by men on men, women  
20 on women, and across as well. It has been received  
21 very, very well in Rwanda, because her activities  
22 were quite notorious, as well as those of her son  
23 also who was similarly convicted of that sort of  
24 offense.

25

1           MR. SCHEFFER: Thank you very much, Hassan.  
2           We will come back to you because there was a lot  
3           going on in Rwanda last year with the tribunal, and I  
4           want to get to as much of that as I can.

5                     Could I jump for a moment to Fidelma?  
6           Let's change the subject completely, Special Court  
7           for Sierra Leone, and although you had no blockbuster  
8           judgments, we know one is coming up soon, April 26th  
9           in the Charles Taylor case.

10                    But during the course of 2011, you  
11           struggled with cases concerning contempt of court.  
12           And could you brief us a little bit on how that  
13           transpired and why that was considered so  
14           significant, particularly from the prosecutor's point  
15           of view to pursue contempt charges, and in what  
16           character?

17                    Fidelma? Yeah.

18                    MS. DONLON: Thank you. Yes. As you  
19           mentioned, David, in 2011, the prosecutor filed a  
20           motion for the investigation of a number of people on  
21           the allegation of the commission of contempt of  
22           court, which is the law and procedure related to  
23           contempt as regulated under Rule 77 of our Rules of  
24           Procedure and Evidence.

25

1                   The motion and the information  
2 contained basically relates to the AFRC case, which  
3 is a case that's actually completed before the  
4 special court. So there was three indictees in that  
5 case. They were all found guilty and they're  
6 currently serving their sentences in Mpanga Prison in  
7 Rwanda.

8                   The information that was received by  
9 the prosecutor was that two of the prisoners in  
10 Rwanda, in conjunction with two individuals in Sierra  
11 Leone, who previously were members of the AFRC, their  
12 names are "Ragga" and "Bomb Blast," that "Ragga" and  
13 "Bomb Blast" had for a period -- over a period of  
14 time in November, contacted protected witnesses,  
15 visited those witnesses, and indicated that in  
16 exchange for money, they would request that they  
17 would recant their testimonies, that basically the  
18 testimonies that they gave in the AFRC case, as I  
19 said, was an indication that there would be money  
20 available if they were prepared to recant their  
21 testimonies.

22                   Also, the information that the  
23 prosecutor put forward was that two of the prisoners,  
24 Bazi and Kanu, one of the prisoners attempted to  
25

1 contact one of the witnesses by phone, and allegedly  
2 the other prisoner actually did speak to one of the  
3 witnesses by phone, again, basically indicating that  
4 they wanted them to recant their testimonies.

5           So the procedure basically is that if  
6 a motion is filed with the Trial chamber, at a  
7 preliminary stage the Trial chamber has to make a  
8 determination whether there's reason to believe that  
9 contempt of court was committed.

10           In this particular case, the Trial  
11 chamber did rule that they had reason to believe that  
12 the aforementioned persons possibly committed  
13 contempt of court under Rule 77 for attempting to  
14 bribe a witness and also for interfering with the  
15 administration of justice.

16           So the procedure, again, is that an  
17 independent investigator -- under our rules basically  
18 it's only an independent investigator that can  
19 investigate contempt rather than, I think, the ad  
20 hocs, which the prosecutor can also -- an independent  
21 investigator was appointed, and the independent  
22 investigator submitted the sealed report to the  
23 chamber. At that point, the chamber issued an order  
24 in lieu of an indictment containing the charges

25

1 against the various individuals for the AFRC.

2 At a preliminary hearing during the  
3 summer, at the initial appearance basically, one of  
4 the individuals, "Ragga," who is the former member of  
5 the AFRC, he's pleaded guilty to the charges  
6 contained in his indictment, and we will see what the  
7 outcome of the trial is, which will be scheduled  
8 after the judgment in the Taylor case. So that's  
9 basically the history of the contempt charges.

10 In terms of the importance, clearly  
11 interference with witnesses and offering bribes to  
12 witnesses to recant testimonies or other forms of  
13 acts, it's extremely serious. And I think as has  
14 been ruled by the various courts, one of the inherent  
15 powers is to prosecute contempt if there's reason to  
16 believe that such acts have taken place.

17 I think the other point that is  
18 important to mention, and I qualify this by dealing  
19 with contempt in the sense of if they do go towards  
20 prosecution, is extremely important at any point in  
21 the history of the tribunals, be from the start to  
22 the completion.

23 But one of the challenges that our  
24 institutions is facing, and I'm sure ICTR is probably

25

1 exactly the same, and Yugoslavia, is we're moving  
2 towards completion of our mandates, and, thankfully,  
3 we have now residual mechanisms which do have the  
4 power, if necessary, at some point in the future  
5 after our courts close, to investigate and, if  
6 necessary, to prosecute contempt cases.

7           But it is very important at this stage  
8 in the history of the tribunals that our witnesses do  
9 not feel abandoned. If there are credible charges  
10 that people are attempting to interfere with  
11 witnesses, it's clearly very important that the  
12 institutions basically use the mandates that have  
13 been conferred upon us to deal with those. So I  
14 think in terms of a broader significance, that is  
15 also very important in the history of our particular  
16 institution.

17           MR. SCHEFFER: Thank you very much, Fidelma.  
18 What I'd like to do now is jump to Cambodia and to  
19 Prosecutor Andrew Cayley.

20           Andrew, we're going to be a little  
21 unorthodox calendarwise here. There was a  
22 tremendously important judgment handed down on  
23 February 3rd of 2012, by the Supreme Court chamber in  
24 Trial Number 1 against defendant Duch, former head of  
25

1 the Tuol Sleng prison in Phnom Penh.

2           And I think it's so significant that  
3 if you could summarize for our audience sort of the  
4 primary findings of that judgment and whether you, as  
5 a prosecutor, were disappointed in any particular  
6 finding or obviously a determination by the Supreme  
7 Court chamber on the Duch -- the final Duch judgment.  
8 Andrew?

9           MR. CAYLEY: Thanks, David. I was wondering  
10 whether there was a deliberate purpose in you and I  
11 sitting so far apart from each other --

12                           (WHEREUPON, there was laughter.)

13           MR. SCHEFFER: There is.

14           MR. CAYLEY: -- you being the special expert  
15 and me being the prosecutor, in case the Cambodian  
16 government examines the video evidence of this to  
17 show there's a lot of distance between us.

18                           No. To actually say one thing from  
19 the outset, and we are really privileged to have  
20 David Scheffer as the secretary general's special  
21 expert with all of his immense experience of these  
22 courts and the very complex political environment in  
23 which these courts operate. We're really very  
24 fortunate to have him at a very difficult time in the

25

1 life of the court. So thank you, David, for all that  
2 you're doing on our behalf.

3 In addressing the question that was  
4 put by David, what I'll do very briefly is examine  
5 three particular areas, first of all, to give you a  
6 brief factual background to the case, to the first  
7 case; secondly, very briefly, to summarize the  
8 judgment of the Trial chamber, and then finally to  
9 summarize the appeals that were lodged both by Duch  
10 himself, by the convicted individual, and also by the  
11 prosecution.

12 Well, very briefly, the facts of this  
13 case are as follows: Between 1975 and 1979, Duch, or  
14 Guek Kaing Eav, was the deputy secretary and then  
15 secretary of the S-21 security camp in Phnom Penh.  
16 In essence, he was the assistant commander for a  
17 brief period of time and then the commander of that  
18 camp between those years.

19 This camp, S-21, was the center of a  
20 network of security camps that were run by the  
21 Democratic Kampuchea, by the Khmer Rouge; during this  
22 period. Their primary purpose was to interrogate,  
23 torture, and eliminate individuals who were perceived  
24 to be enemies of the regime, and the definition of  
25



1 people that were enemies of the regime developed to  
2 sort of insane levels during the course of the Khmer  
3 Rouge period.

4           Ultimately, the Trial chamber found  
5 that over 12,000 men, women, and children perished in  
6 that place. I don't know if any of you have been to  
7 the S-21 security camp. It is, in fact, a converted  
8 high school that they used, and parts of it have been  
9 returned to exactly how it looked at the time.

10           Many of the families who vanished  
11 within S-21, really their only offense against the  
12 state was to be related to somebody who had been  
13 denounced by another prisoner who had been tortured.  
14 So you can imagine that within this group of over  
15 12,000 people, there were many, many innocent people  
16 who had done absolutely nothing at all other than to  
17 be related by somebody who had fallen out of favor  
18 with the regime, often because they had been  
19 denounced by somebody who had been tortured. So  
20 that's the very, very brief factual background.

21           At trial, Duch was found guilty of the  
22 crime against humanity of persecution. The other  
23 crimes that had been charged in the closing order in  
24 the indictment were extermination, encompassing  
25

1 murder, enslavement, imprisonment, torture, including  
2 rape and other inhumane acts. Those were subsumed  
3 within the charge of persecution. He was also found  
4 guilty of a number of grave breaches of the Geneva  
5 Convention.

6                   Now, Duch himself appealed on the  
7 issue of personal jurisdiction. The personal  
8 jurisdiction of the court is such that it was  
9 established, and I'm reading now from Article 2 of  
10 the law on the establishment of the court: "To bring  
11 to trial senior leaders of Democratic Kampuchea and  
12 those who were most responsible for the crimes and  
13 serious violations," et cetera, including of  
14 Cambodian law.

15                   And one of the things that was  
16 mentioned at the start by one of the speakers  
17 essentially describing all of these courts as  
18 international courts, the ECCC actually is a domestic  
19 court. It was established within the domestic  
20 structure of the Cambodian system. It's often  
21 described as an internationalized domestic court,  
22 which is a bit of a mouthful, but probably represents  
23 the reality more than describing it as an  
24 international court. As I say, we also have

25

1 jurisdiction in respect to Cambodian domestic  
2 criminal law.

3 Now, there is some background that I  
4 need to give you on this because it's probably an  
5 area that the judgment does not entirely satisfy. At  
6 the beginning of the trial, in accordance with the  
7 normal practices of all the international courts, the  
8 accused are given the right to make jurisdictional  
9 challenges.

10 And at the beginning of his trial,  
11 Duch did not make such challenge, but he was and his  
12 counsel were asked, "Do you propose to make any  
13 jurisdictional challenges, including challenges to  
14 the personal jurisdiction of the court?" And the  
15 answer was no, he did not intend to challenge the  
16 personal jurisdiction of the court.

17 The trial proceeded. It was, in  
18 essence, a guilty plea. Although it being a civil  
19 law trial, a lot of the evidence was heard and  
20 challenged.

21 And then at the end of the trial, he  
22 essentially made challenge to the personal  
23 jurisdiction of the court, saying, "Okay, yes, I'm  
24 responsible, but I'm actually not within the personal  
25

1 jurisdiction of this institution because I'm not  
2 senior nor one of those who are most responsible."

3           And within the trial judgment, the  
4 judges simply said, "Actually, you're too late. You  
5 were given the opportunity at the beginning of the  
6 trial, and it's too late to raise it at the end.  
7 But, in any event, we will examine this issue and we  
8 find you to be one of those most responsible even  
9 though you are not one of those who are most senior."  
10 So that is some of the background to that particular  
11 issue.

12           Now, in essence, what was found by the  
13 Supreme Court chamber is that the court essentially  
14 has jurisdiction over really two categories; first of  
15 all, senior leaders who are most responsible, and  
16 then others who are not senior leaders, but are most  
17 responsible.

18           But they also found that, in essence,  
19 the issue of personal jurisdiction was  
20 nonjusticiable, that, in essence, it was a matter of  
21 discretion for the co-prosecutors and the  
22 co-investigating judges and, in essence, could not be  
23 examined by the Trial chamber or by the Supreme Court  
24 chamber.

25

1           Only -- the only exception to that was  
2 instances essentially of bad faith, and that may --  
3 that may be an issue that's subsequently examined in  
4 3 and 4, but we'll wait to see about that.

5           So, in essence, his appeal was  
6 dismissed. Now, the OCP, we appealed a significant  
7 number of issues, which I won't have time to address  
8 all of them, but as David has said, the most  
9 important were the following:

10           We argued that the Trial chamber had  
11 erred in subsuming all of these crimes against  
12 humanity within the persecution charge, and our other  
13 main ground of appeal is that the Trial chamber had  
14 erred in respect of sentencing.

15           At trial, at the end of the trial, in  
16 the Trial chamber's determination, Duch was sentenced  
17 to a period of 35 years, reduced to 30 years, as a  
18 result of a period of illegal detention under the  
19 jurisdiction of the Cambodian government. I think it  
20 was a period of about eight years and he was given  
21 five years for that. He had already served a period  
22 of 11 years by the time we got to the Trial chamber  
23 judgment, so he ended up with a sentence of 19 years.

24           Now, you can imagine within a  
25

1 developing country like Cambodia where virtually  
2 everybody is linked in some way to a victim of the  
3 Khmer Rouge regime, people were absolutely horrified  
4 by the fact that this man had received 19 years  
5 imprisonment for over 12,000 victims. And it was  
6 very difficult, I found it very difficult trying to  
7 explain to public gatherings why he had only received  
8 19 years of imprisonment.

9                   But what I had welcomed at the time  
10 was the fact that the Trial chamber, which included  
11 Cambodian judges, had determined that there had been  
12 a period of illegal detention, because this was  
13 illegal detention essentially under the direction of  
14 the prime minister.

15                   And, as you well know, in Cambodia  
16 there are many problems with the way Cambodian judges  
17 essentially exercise their duties. There are many  
18 allegations of government interference and patronage  
19 of judges. So for Cambodian judges to make this kind  
20 of independent determination was something that we  
21 welcomed very much.

22                   On appeal, we argued that the Trial  
23 chamber had given far too much weight to mitigating  
24 circumstances and had not given enough weight to  
25

1     aggravating factors. We emphasized the exceptional  
2     gravity of the crimes, which we submitted neutralized  
3     any mitigation that existed. This was a decision  
4     that I made after I'd arrived at the court. We  
5     submitted that the only appropriate punishment was  
6     life imprisonment, and we submitted that that life  
7     term should be reduced to a single term of 45 years  
8     to take into account the period of illegal detention  
9     under the Cambodian government.

10                 We also argued that if there were any  
11     mitigating circumstances -- and at appeal I argued  
12     that, frankly, because of the gravity of the crimes,  
13     any mitigation reached a vanishing point -- that the  
14     minimum term that he should receive was between 40  
15     and 45 years.

16                 The Supreme Court chamber in its  
17     judgment gave a life term with no reduction for  
18     either the period of illegal detention or any  
19     mitigating circumstances. They adopted the  
20     description that we had given on appeal of the S-21  
21     security camp as a "factory of death."

22                 I was personally obviously  
23     disappointed that they did not give any credit for  
24     the period of illegal detention. There was a  
25

1 significant outcry from the nongovernmental  
2 organizations.

3           In essence, the reason given by the  
4 majority of the judges -- there was a dissent by two  
5 international judges -- was that it was not the  
6 Extraordinary Chambers that was responsible for this  
7 period of illegal detention; thus, they could not  
8 give a remedy. I'm not sure I entirely agree with  
9 that reasoning, particularly when you bear in mind  
10 what I said a moment ago, that the ECCC is actually  
11 part of the domestic structure. It's very different  
12 to the Rwanda situation where it's an international  
13 court trying to give remedy for a domestic abuse.

14           They also concluded that it was not an  
15 abuse of process that he was detained illegally for  
16 that period of time. And I also wonder how they came  
17 to that conclusion. We don't yet have a written  
18 judgment. Everything I'm saying is based on the oral  
19 judgment of the court. Maybe that issue will be  
20 fleshed out. He was, thank goodness, given 13 years'  
21 credit for time served, and, as a lifer, he will be  
22 eligible to apply for parole in seven years' time,  
23 the 20-year mark.

24           Briefly, I'll talk about the civil  
25



1 parties. As you know, the ECCC is a court based on  
2 French civil law, so we have victims who are civil  
3 parties who are parties to the proceedings. The  
4 primary issue that really arose on appeal were those  
5 individuals who were not direct victims themselves,  
6 so not survivors of the camp, but who were indirect  
7 victims, and, of course, there are hundreds of  
8 thousands of indirect victims of differing degrees  
9 living in Cambodia, relatives of people who were  
10 victims of the regime, in this particular case, those  
11 people who perished within the S-21 security camp.

12                   At trial in the Trial chamber  
13 judgment, the Trial chamber confirmed that in order  
14 to be an indirect victim; in other words, if you were  
15 related to somebody who died as a result of Duch's  
16 crimes in S-21, you had to show special bonds of  
17 affection or dependence, and this essentially limits  
18 how far removed you can be as a family member, so you  
19 have to be really within the immediate family of a  
20 victim to make a claim as a civil party.

21                   The Supreme Court chamber approved of  
22 that reasoning. One of the problems -- and I'm  
23 almost done, David, really, just one more minute.  
24 One of the difficulties that arose was that there was

25

1 a two-part approval process to be admitted as a civil  
2 party. So the Trial chamber in 2010 made an initial  
3 determination on whether individuals could be civil  
4 parties based on quite a low threshold.

5           Then at the end of the judgment, they  
6 made another determination and re-examined all of the  
7 evidence to decide whether or not somebody was  
8 qualified, whether or not they could show these  
9 special bonds of affection and dependence with the  
10 direct victim. And, unfortunately, again, much as a  
11 result of the fact that we're developing -- we're  
12 dealing with a developing country with fairly low  
13 levels of education, and, actually, to be sympathetic  
14 to the victims, fairly low levels of support, so  
15 people who were admitted during this first phase of  
16 consideration ended up falling out on the judgment.

17           And you can imagine people 30 years  
18 later, especially when it was an immediate relative  
19 like a brother or a sister or a father or a mother,  
20 suddenly being told, "Well, sorry, you actually  
21 haven't established your claim properly before the  
22 court," there were many people that were extremely  
23 upset, and I recall scenes outside the courtroom  
24 which were very distressing.

25

1                   And the Supreme Court chamber  
2 addressed that issue and found that the Trial chamber  
3 hadn't communicated this process effectively to the  
4 civil party community and allowed people to present  
5 further evidence during the appellate process,  
6 uplifting the evidence that they had originally  
7 offered to establish their claim, and a number, I  
8 think it was another nine civil parties were  
9 admitted.

10                   I think, as I say, overall for all of  
11 the criticism that the court gets, I mean, I'm sure,  
12 you know, you read about it every day -- I've given  
13 up reading newspapers -- I think it was a good  
14 result. I think it satisfied the victim communities.  
15 I've been criticized by NGOs for essentially reacting  
16 to public outcry. I don't see any problem with that  
17 at all. I think that's what prosecutors do. It's a  
18 matter of public policy that victims' needs should be  
19 addressed, you know, within the boundaries of law and  
20 procedure of the court.

21                   I certainly agree that there should  
22 have been some kind of consideration of this period  
23 of illegal detention. I think that's a shame because  
24 one of the other functions that we have in Cambodia  
25

1 is to try and build capacity within the domestic  
2 legal system, but I need to wait to read the final  
3 written judgment to examine the reasoning that was  
4 given for that particular decision, and, indeed, as  
5 I've said, two international judges dissented and  
6 stated that he should have been given a remedy for  
7 that period of illegal detention.

8 Thank you, David.

9 MR. SCHEFFER: Thank you very much, Andrew.  
10 You know, first I'm going to apologize to Iain  
11 Morley. We are coming to you, Iain. It is going to  
12 happen.

13 First I'm going to jump to Mark  
14 Harmon, if I may, who has also been very patient, and  
15 ask him to describe to us, I think, sort of the  
16 perspective within the prosecutor's office of the  
17 capture of Ratko Mladic and of Mr. Hadzic last year,  
18 the last two indicted fugitives of the Yugoslav  
19 Tribunal, and the importance of their arrival at The  
20 Hague, and I'd also like him to comment on the denial  
21 of the severance motion in the Mladic case.

22 Mark?

23 MR. HARMON: David, thank you. Of course,  
24 when Ratko Mladic and Hadzic were arrested, there was

25

1 euphoria in the tribunal, as you can well imagine.  
2 When I started at the tribunal in 1994, there were  
3 few resources. We all -- it was a labor of love. We  
4 labored in hope that one day we would be able to have  
5 arrested and prosecute and try to conviction the  
6 people we had indicted.

7           The situation in which we worked was  
8 we had no police to make arrests, we had the Federal  
9 Republic of Yugoslavia and Serbia, hostile to the  
10 tribunal and noncooperative. We had Croatia that was  
11 nominally cooperative as long as one of the accused  
12 was not a Croat. So we had a lot of difficulties in  
13 terms of expecting that we would arrive at the point  
14 where we arrived with the arrest of Mladic and  
15 Hadzic.

16           One of the implications, of course, of  
17 their arrest is the impact on the completion  
18 strategy, because we had an unfortunate convergence  
19 of having two of the biggest defendants arrested at a  
20 time when we were seriously downsizing, and that had  
21 huge staff implications. I won't comment more on  
22 that, maybe it will it be a subject of discussion  
23 later.

24           One of the significant things about  
25

1 the arrest of Hadzic and Mladic is we at the Yugoslav  
2 Tribunal indicted 161 people and we arrested 161  
3 people, or with the exception of some deaths -- I see  
4 David Ray shaking his head -- there were some people  
5 who died. But, ultimately, everybody who had been  
6 indicted met some form of justice, whether it was  
7 Divine justice --

8 (WHEREUPON, there was laughter.)

9 -- or whether it was Yugoslav justice,  
10 they met justice, and it's the first tribunal in  
11 history that had a hundred percent success rate in  
12 terms of its arrests and justice being delivered.

13 Now, let's talk about the Mladic  
14 severance motion. Now, this was a motion that was  
15 filed after I left, so I had to read it the other day  
16 and had to read the decision, but I understand the  
17 decision. And let me share it with you.

18 Mladic was indicted for four separate  
19 crime bases: the crimes that were committed at  
20 Srebrenica, the crimes that were committed in  
21 municipalities in Bosnia and Herzegovina, crimes  
22 committed at Sarajevo, and crimes in relation to the  
23 taking of UN hostages.

24 The prosecution -- and let me just add  
25

1 that Mladic is somebody when he was arrested who was  
2 in bad health. I'm not sure -- I can't give you a  
3 health update, but he may still remain in some --  
4 there may be some health concerns.

5 But the prosecution then sought to  
6 sever the four crime bases into one trial involving a  
7 prosecution of Mladic for the crimes committed at  
8 Srebrenica and have a second trial with the three  
9 remaining sets of crimes in a second trial.

10 The prosecution asserted the following  
11 in terms of its motion, its application for  
12 severance: Separate trials would maximize justice  
13 for the victims, would not prejudice the accused, the  
14 trial, the separate trials, could be managed more  
15 efficiently, and then it used some cryptic language.  
16 It said severing the second indictment would better  
17 meet, quote, "unforeseen contingencies," close quote,  
18 should Mladic's health deteriorate. And, finally,  
19 they asserted that a severance was consistent with  
20 the Rules of Procedure and Evidence.

21 As you can imagine, the defense  
22 vigorously opposed the application for severance. It  
23 said essentially that Mladic would not have adequate  
24 time to prepare for the second trial because he would  
25

1 be engaged in the first trial, and that would --  
2 because of the limited resources that were available  
3 to him, it would disadvantage him.

4 He also asserted that denying -- it  
5 would affect his ability to present his defense  
6 effectively because the events in the other related  
7 areas would have to be introduced during his  
8 Srebrenica trial in order to make sense out of the  
9 Srebrenica crimes, what took place. He also asserted  
10 that there would be a repetition of witnesses who  
11 would have to come in the cases. For example, a  
12 witness would come and describe who he was and what  
13 his authorities and competencies were in one trial,  
14 and the witness would have to be recalled in the  
15 second trial.

16 He also asserted that it would take  
17 him more time with two trials because he would be  
18 working on his pre-trial preparations at the same  
19 time he was defending his active trial, and that  
20 would slow down the process, the result of which  
21 would make the trial less efficient.

22 Now, the Trial chamber had to balance  
23 the competing allegations. The Trial chamber  
24 rejected the prosecution's motion for a severance,  
25



1 and it found that there would be prejudice to Mladic  
2 if the cases were severed, it could render the trials  
3 less manageable and efficient, and the two trials  
4 would unduly burden the witnesses who would be called  
5 in both trials.

6 That is essentially the brief version  
7 of what the decision was, and in that opinion as  
8 well, the Trial chamber chastised the prosecution for  
9 being cryptic, essentially. It said that it would  
10 not consider Mladic's health as a factor since no  
11 information on his health had been presented to the  
12 Trial chamber; there had been no medical reports  
13 presented.

14 It said if unforeseen circumstances  
15 meant that it's better to conclude with a judgment of  
16 conviction or acquittal in at least one smaller  
17 trial, it should have argued the point directly and  
18 not cryptically.

19 And it said -- finally, it said that  
20 if the underlying motion, the basis for the  
21 underlying motion, was the health concerns and  
22 situation of Mladic, it should have made detailed  
23 submissions with medical records to support the  
24 submissions. That, in essence, is the decision in  
25

1       why the severance motion for Mladic was denied.

2               MR. SCHEFFER:  Mark, can I just ask you, do  
3       you have any personal opinion about whether that was  
4       a wise judgment by the chamber?

5               MR. HARMON:  Well, my personal opinion is I  
6       can agree with it.  I mean, the defense said, "We're  
7       ready, we will be ready to manage all the cases at  
8       once."  I do understand, having worked many witnesses  
9       over my career, that having to have their lives  
10      disrupted time and time again is a burden, and I  
11      frankly think that the Trial chamber was correct in  
12      terms of assessing the burden on the defense in terms  
13      of having to manage a case for pre-trial when the  
14      pre-trial is a very onerous set of obligations,  
15      managing a pre-trial case at the same time you're  
16      running a case.  So, yes, I think that the  
17      decision -- I agree with the decision, frankly.

18              MR. SCHEFFER:  Now, hang on just one moment,  
19      Iain, because I know this issue of severance touches  
20      many chords with several people, and if I could just  
21      solicit very, very short comments, I'm wondering  
22      whether Caroline might have anything to say about  
23      severance?  Did you -- Caroline, did I see you  
24      leaning over or not?  No?

25

1                   And I know, Andrew, you want --  
2       Caroline, did you have something that you wanted to  
3       briefly say? No?

4                   Okay. Andrew, I know severance is a  
5       big issue on your docket.

6                   MR. CAYLEY: Yeah. It's actually interesting  
7       listening to what Mark says because all of the  
8       reasons that they've given why, you know, they reject  
9       it, the severance, are actually, you know, many of  
10      the reasons why, you know, we were urging the court  
11      to have a more expansive first indictment.

12                   I mean, one of the arguments we  
13      actually put forward, in essence -- what has happened  
14      just briefly, the background to it: In case 2,  
15      because of the size of the indictment, the court has  
16      severed the case in particular because of the size of  
17      the indictment and the age of the accused and the  
18      fear that if we tried the whole case in one go, we  
19      will lose accused along the way.

20                   So chronologically in terms of all of  
21      the crimes that were committed, the first major crime  
22      was the forced displacement of the Cambodian  
23      population from city centers, including Phnom Penh,  
24      the capital, and, in essence, what the court has done

25

1 is it's stated that there will be a series of  
2 minitrials, and the first minitrial will include all  
3 of the linkage evidence, so all of the evidence  
4 linking the accused to all of the crimes within the  
5 indictment, but the only crime or crimes that will be  
6 addressed is the forcible transfer from Phnom Penh  
7 and the murders that were associated with that  
8 forcible transfer, which, on a factual basis, is  
9 actually linked to individuals from the previous  
10 regime, the Lon Nol regime, that preceded the Khmer  
11 Rouge regime, who fled with the rest of the  
12 population during the forced displacement, and these  
13 people were pulled out from the columns and murdered.

14           And one of the difficulties I had with  
15 this is how can you hear all of the linkage evidence  
16 for all of these minitrials, come to a determination  
17 only on the forcible transfer, and then transmit all  
18 of that evidence into the second minitrial? I  
19 actually don't see how that can be done if you look  
20 at all of the jurisprudence of all of the courts.  
21 There's no mechanism, particularly where it involves  
22 acts and conducts of the accused, and there's been no  
23 answer from the bench as to how we're actually going  
24 to do this.

25



1     been back twice to the court, they've rejected me  
2     twice, but they've left the door open to include more  
3     crime sites within this first minitrial. So we  
4     simply wait and see.

5                     But I do believe, unfortunately, that  
6     the Trial chamber has created an extremely complex  
7     situation here, let alone an appeal in the first  
8     case. I mean, they're saying that we can actually  
9     move to the second trial while the first appeal is  
10    pending, or that there will be a consolidated appeal  
11    of all of these minitrials at the end. But I've not  
12    been given a road map, nor do I really know the route  
13    myself as to how we're going to do this.

14                    MR. SCHEFFER: Yeah. Very interesting,  
15    Andrew.

16                    Diane, hold your thought for a moment.

17                    I want to go to Iain Morley, who has  
18    been extremely patient, and, frankly, he is our host  
19    today, so we owe him everything, absolutely  
20    everything.

21                    Iain, in the year 2011, this court  
22    rendered a decision on the crime of terrorism, and  
23    the late Judge Cassese was deeply involved with that  
24    decision, and we honor him today. He's someone I

25

1 knew for 20 years. In fact, you know, he -- just to  
2 tell you one anecdote.

3           The first day that Madeleine Albright  
4 and I arrived at the Yugoslav Tribunal in January of  
5 1994, there were only a couple of people in the  
6 offices, one was Judge Cassese and the other one was  
7 Graham Blewitt, and they took us down these long  
8 hallways of the Yugoslav Tribunal, totally empty, and  
9 they -- Judge Cassese turned to Madeleine and me and  
10 said, "I must fill these offices." And that started  
11 our journey of how do we do that, how do we second  
12 people, and, of course, you see Mark Harmon sitting  
13 in front of us here today.

14           Iain, could you talk to us about this  
15 fascinating decision on the crime of terrorism?

16           MR. MORLEY: Thank you very much, David, and,  
17 yes, everybody is very welcome to the STL. I hope  
18 you enjoy the Blue Room here.

19           First of all, a word about Judge  
20 Cassese, if I may. What a great loss in last year --

21           MR. SCHEFFER: Um-hum.

22           MR. MORLEY: -- in October. It is a tribute,  
23 I think we would all agree, to Judge Cassese that he  
24 worked up until ten days before he passed, and that

25

1 is a reflection of his commitment to the work that he  
2 had been doing over the previous 15 or 16 years in  
3 The Hague, and, of course, throughout his time as an  
4 academic before then, a man of enormous energy and a  
5 lively mind who has been at the heart of so much what  
6 has been international criminal law. He is a great  
7 loss, and I think I say nothing unsurprising when I  
8 say it was a terrible shock. It wasn't anticipated  
9 that he was so ill, and he is sorely missed.

10 With regard to the crime of terrorism,  
11 you may all be aware that in January of 2011, there  
12 was a hearing in the Appeals Court here to consider  
13 the parameters legally of what may take place in  
14 courtroom proceedings at the STL.

15 There is a provision under the rule,  
16 rule 176bis, which allows the Pre-Trial judge to  
17 refer to the Appeals chamber questions of law and to  
18 seek the guidance of the Appeals chamber as to what  
19 the law is here at the STL. And the reason for  
20 making that reference is -- it is obvious now. He  
21 was in the business of considering an indictment  
22 application, and he required assistance as to what  
23 the applicable law was because under our statute, we  
24 apply the Lebanese law primarily.

25



1                   We are required to apply not  
2 international law as is more common at the other  
3 tribunals, but here it is domestic Lebanese law.  
4 And, of course, the question arises: Is there a  
5 conflict of any sort with regard to international law  
6 norms, or are there any lacuna in the domestic law  
7 which can be filled by reference to international  
8 law?

9                   And where there is a conflict, where  
10 there are lacuna, what should be the prevailing  
11 approach? To apply domestic norms? To apply  
12 international norms? Or to apply essentially the  
13 principle everything should be resolved in the favor  
14 of the defendant?

15                   And, as a result of the rule 176bis,  
16 questions were referred to the Appeals Court for  
17 consideration. There were a lot of questions, one of  
18 which was what is terrorism internationally? What is  
19 it we are dealing with as a crime here at the STL?  
20 Now, this was an interesting area because, firstly,  
21 there was the issue of motive, and, secondly, there  
22 was the issue of lots of different conventions and  
23 treaties have mentioned terrorism, but nowhere has it  
24 been defined internationally.

25

1                   And it was apparent that Judge  
2           Cassese, lively of mind as he has always been, was  
3           curious to see whether or not terrorism might be  
4           definable internationally for the benefit of the  
5           international community. So the 176bis application  
6           became, to some extent, an opportunity to consider  
7           this.

8                   There were other questions as well,  
9           but on a narrow issue of terrorism, we know that one  
10          of the areas that required consideration was do you  
11          have to prove a political motive in order to show  
12          that a crime is a crime of terrorism? And there was  
13          something of a debate about this because there had  
14          been writings, not least from Judge Cassese, that  
15          political motive is something that one would look for  
16          when looking at terrorism, and there was an argument  
17          that it may not be necessary.

18                  And in the end, the judgment which was  
19          rendered on the 16th of February of 2011 found that  
20          establishing a political motive may not be necessary.  
21          It could be contextual, it could be part of the  
22          circumstance of what has happened, but it is not a  
23          necessary element that needs to be proved in order to  
24          establish that a crime is terrorism.

25



1 issues. It deals with the relevance of cumulative  
2 charging and plurality of charges, it deals  
3 additionally with modes of responsibility, it deals  
4 additionally with what are the elements of  
5 intentional homicide, what are the elements of  
6 attempted intentional homicide, what are the elements  
7 of conspiracy, and, as I've mentioned earlier, it  
8 also deals with what is terrorism. It's a  
9 substantial learned piece of work, and you're all  
10 recommended to read it.

11 I hope that helps, David.

12 MR. SCHEFFER: Iain, it does. Could you just  
13 briefly update us on the issue of trials in absentia?  
14 It would just be, I think, useful to get an update on  
15 that.

16 MR. VIDEOGRAPHER: Hold your thoughts. We're  
17 changing the tape.

18 (WHEREUPON, Disk 2 ended.)

19 MR. SCHEFFER: Caroline, I'm going to come to  
20 you very -- just in a second, and then we're going to  
21 start the cir -- cycle again.

22 Okay. Let's continue, if I could  
23 bring everyone to order.

24 Iain, could you just give us an update  
25

1 on the issue of trials in absentia before the Special  
2 Tribunal for Lebanon?

3 MR. MORLEY: Yes. Certainly, David. There is  
4 a provision within the rules at the Special Tribunal  
5 for Lebanon to hold trials in the absence of accused,  
6 and a decision was rendered earlier this year that  
7 there will be a trial in absentia in respect of the  
8 indictment, which you can all see, as I say, in  
9 redacted form on the web site, relating to four  
10 absent defendants, whose names you will all know:  
11 Ayyash, Badreddine, Oneissi, and Sabra.

12 There was an argument in November of  
13 2011 -- about three and a half months before the  
14 final decision to proceed in absentia, there was an  
15 argument in November of 2011 as to giving the  
16 Lebanese more time to effect the arrest warrants  
17 which flowed naturally from confirmation of the  
18 indictment, which took place at the end of June of  
19 2011. There was an argument that if they had more  
20 time, they might lift somebody, or, at the very  
21 least, it may be of some assistance to get more  
22 information about what are the difficulties in  
23 Lebanon of effecting arrests.

24 Now, for those of you who have been  
25

1 following this interesting and erudite place, the  
2 Special Tribunal for Lebanon, you will know that the  
3 four defendants are said on the face of the redacted  
4 indictment to be associated with a -- an organization  
5 in Lebanon called Hezbollah.

6 For those of you who know anything  
7 about the way things work in Lebanon, it's not very  
8 easy to arrest members of Hezbollah. That doesn't go  
9 down very well in their neighborhoods, and it's been  
10 made perfectly plain that the organization, which is  
11 political, not just military, it is a very  
12 sophisticated political organization which has great  
13 influence over the social circumstance of many  
14 members of the Shiite community in Lebanon.

15 In order to effect arrests, one  
16 essentially would need to go into areas which are  
17 controlled by this particular organization, and you  
18 basically need their permission to be in those  
19 environments. And they have made it plain through  
20 their leadership that they don't wish to cooperate  
21 with any arrest procedure, and, as a consequence of  
22 that, it has been, to put it in its at least  
23 dramatic, difficult to effect the arrest warrants.

24 Now, that became apparent to their  
25

1 Honors sitting in the Trial chamber who were -- had  
2 referred to them the issue as to whether to proceed  
3 in absentia, and, as a result of what they learned in  
4 material placed before them from Lebanon, a decision  
5 was taken to proceed in absentia.

6 Now, what does that mean? Well, we're  
7 not entirely sure. There is going to be a trial with  
8 no defendants. The last time that happened was when?  
9 Does anybody have the answer to that? There is an  
10 answer.

11 MR. POWDERLY: Martin Bormann.

12 MR. MORLEY: Martin Bormann. Well done, Joe.  
13 Thank you. I see Joe Powderly from Leiden University  
14 in the background there.

15 It was Martin Bormann during the  
16 Nuremberg Trial of 1946, which, incidentally, lasted,  
17 I think, about nine months, 22 defendants. You might  
18 want to remember that, given how long some other  
19 trials take.

20 Martin Bormann wasn't there at the  
21 trial and was convicted in absentia, and, in fact,  
22 sentenced to death in absentia. We don't entirely  
23 know yet how the trial process will emerge, to what  
24 extent the judges will be in control of the process

25

1 as distinct from counsel, as to what evidence will be  
2 called, what defenses can be positively run.

3           But we can say this: That as a result  
4 of the decision to proceed to a trial in absentia,  
5 there has now been an appointment of defense counsel,  
6 and there are four defense teams in flagrante as we  
7 speak, who are seized of various issues and features  
8 of disclosure, and they are, of course, beginning to  
9 file arguments and motions so that the proceedings  
10 are slipping quickly now into litigation.

11           And they are distinguished counsel.  
12 There's people from a long history of being involved  
13 in the international tribunals. So what we do know  
14 is that people who know what they're doing are here  
15 and they are about their business. How it will play  
16 out, we're not entirely sure. It is possible that  
17 the trial in absentia would be a short process. It  
18 is possible it could be extremely long because  
19 conceivably every notional defense can be run if you  
20 have no instructions.

21           And it is also useful to perhaps  
22 reflect on how the trial in absentia provision over  
23 in Lebanon is, generally speaking, regarded as a  
24 formality, and it is a process which does not include  
25



1 the active participation of the defense, so that it  
2 is not unusual -- well, let me start that again.

3 It is almost unheard of in Lebanon for  
4 a trial in absentia process to result in an  
5 acquittal. It is a formality which is generally done  
6 on the face of the papers.

7 But we are embarked upon a different  
8 sort of exercise under the heading "Trial in  
9 Absentia," and how that exercise actively plays out  
10 as a matter of procedure, as a matter of arguments,  
11 as a matter as to what can properly be put forward by  
12 the defense. We don't know yet, and we look forward  
13 very much to getting stuck in, in the courtroom. I  
14 hope that helps.

15 MR. SCHEFFER: Thank you very much, Iain.

16 I think Hassan, you wanted to have a  
17 short intervention, and then I want to turn to  
18 Caroline.

19 MR. JALLOW: A brief one on the same issue.  
20 Of course, the ICTR and the ICTY statutes don't  
21 provide for trials in absentia, and that is part of  
22 our problem.

23 When you have a body of fugitives whom  
24 you can't arrest and you are losing your evidence,

25

1 the witnesses are dying, some are -- cannot be  
2 traced, et cetera, what do you do, given that you  
3 can't try them in absentia?

4           And what we did was to come up with  
5 the approval of a plenary of judges with the new Rule  
6 71bis, which allows the prosecutor to call his  
7 witnesses in the absence of the accused person, have  
8 them subjected to cross-examination for the purpose  
9 of preserving the evidence. And we've gone through  
10 that process in respect of three of our top  
11 fugitives, but the door, of course, now has been  
12 opened by the judges who, under the Rule, grant  
13 similar applications to the defense for them to  
14 preserve the evidence on behalf of the defense who  
15 is -- at large, one accused who is at large, and who  
16 presumably has not given any instructions to defense  
17 counsel. So you now have also then the defense  
18 counsel leading potentially defense witnesses to  
19 preserve their evidence.

20           The judges have now had to restrict  
21 the limits within which the counsel can do that. It  
22 must be a kind of direct response to the evidence  
23 that had been laid by the prosecution for  
24 preservation. But that's the way we've been trying

25

1 to address this problem of having to maintain our  
2 cases, preserve our cases, given the fact that we  
3 cannot have trials in absentia.

4 This being said, that is almost like a  
5 trial in absentia, but it's not, because the judge  
6 only confirms the testimony of the witness and  
7 doesn't make any findings on credibility, on guilt,  
8 et cetera. I thought that might interest you, too.

9 MR. SCHEFFER: Very interesting. Thank you,  
10 Hassan.

11 I want to jump to Caroline here, if I  
12 may. Caroline, the issue of exculpatory evidence  
13 reared its head in 2011, particularly in the  
14 Government II judgment in the Rwanda Tribunal, as  
15 well as we even heard it this morning very briefly  
16 mentioned indirectly with respect to the delay that  
17 took place in the year 2008 in the Lubanga trial, and  
18 the judge noted that delay, and, of course, he was  
19 talking about a big issue of exculpatory evidence  
20 when he made reference to that this morning.

21 Could you, from the defense side, just  
22 speak briefly about the importance of the issue of  
23 exculpatory evidence, the role of the prosecutor in  
24 delivering -- particularly at the International  
25

1 Criminal Court where this issue has arisen a couple  
2 of times now, the duty to demonstrate due diligence  
3 on the issue of exculpatory evidence.

4 MS. BUISMAN: Yes. Thank you. I'll do that.  
5 I was hoping maybe at a later stage I could make some  
6 comments as well on what has been said because --

7 MR. SCHEFFER: Sure.

8 MS. BUISMAN: -- I'm ultimately the only voice  
9 for the defense, even though I have some people who  
10 have definitely worked for the defense around me.

11 On exculpatory, obviously we have two  
12 issues: There's the disclosure application on the  
13 prosecution, and the ICC goes a step further,  
14 because, actually, the prosecution has the obligation  
15 to investigate incriminating and exonerating  
16 circumstances equally, which is a much, much, much  
17 further step.

18 So on disclosure -- on the importance  
19 of exonerating evidence, well, I think it's quite  
20 clear that this is really important, but,  
21 particularly, for instance, in the Lubanga case, as  
22 you said, it's actually led to a stay, because there  
23 was all this disclosure material that wasn't  
24 disclosed to the defense because the prosecutor had

25

1     obtained it on an agreement not to disclose it.

2                     Then you have these issues.  If  
3     there's exonerating evidence, what do you do?  Well,  
4     of course, in Lubanga, it is a particularly serious  
5     situation because even the judges couldn't actually  
6     look at it, so that's also why it led to a stay.  And  
7     eventually they came to a sort of agreement that at  
8     least they could look at it and they could decide to  
9     what extent this was material that if not -- if it  
10    wasn't disclosed to the defense, it would have  
11    actually led to unfairness.

12                    We had the same problem, by the way,  
13    in Katanga, but we're always the second, so for us it  
14    doesn't blow up as much, same with the intermediaries  
15    and everything, but we've definitely had the same  
16    issue.  We had many, many documents that could not be  
17    disclosed.

18                    And eventually it all resolved itself,  
19    and I think now internally the prosecution has dealt  
20    with this problem, because in the beginning there was  
21    definitely this -- yeah, they obtained a lot of  
22    evidence through that manner, and I think after  
23    Lubanga, that was sort of -- that stopped that  
24    business, which is why it's good sometimes, I think,

25

1 when the judges do something about this sort of  
2 practice, because, I'm sorry, but I think at the  
3 ICTR, particularly in the beginning, we've had real  
4 issues with disclosure obligation, failure to  
5 disclose.

6                   And it's only recently that the judges  
7 really reacted strongly to it, and I think that's the  
8 only way to make sure that the prosecution actually  
9 will comply with this very important obligation. In  
10 fact, in the Bizimungu judgment, they even said it's  
11 equally important to disclose exonerating evidence as  
12 it is to investigate and -- to prosecute -- sorry.

13                   As you probably are aware, in  
14 Bizimungu, this actually led to an acquittal because  
15 they made it very clear in the case of Bicamumpaka,  
16 that on one issue, if not for the late disclosure,  
17 they would have found that there was evidence to  
18 convict him on. And, I mean, from the defense point  
19 of view, I do agree with that judgment because it was  
20 very serious. It's two years too late, more than two  
21 years too late, and it was directly important to one  
22 of the incriminating witnesses who otherwise they  
23 would have believed. But then you see that this same  
24 witness testifies in another trial and gives a very

25

1 different account. This is obviously important, not  
2 just to the defense, but, generally speaking, to  
3 international justice.

4 I think in the -- so this is --  
5 there's been many, many cases where this has come  
6 about, but this is obviously the most extreme  
7 situation where it's actually led to an acquittal,  
8 but if you look at the judgment, they -- they see no  
9 other way at this stage. They couldn't recall him.  
10 It's already -- I think by the time this came out,  
11 this was already a year and a half after the case was  
12 closed. Sorry. I mean, correct me if I'm wrong on  
13 the exact time, so this was the only option  
14 available.

15 In the ICC, I think the pros -- this  
16 is actually the complaint in absolutely every case:  
17 The defense complains that the prosecution does not  
18 actually investigate exonerating circumstances  
19 equally. I think that's more the problem than the  
20 disclosure issue, apart from what I just said in  
21 Lubanga. I do think that's resolved now. It's  
22 definitely better than at the ICTR. I'm sorry to say  
23 that. But, I mean, we do have an issue with this  
24 investigation of exonerating evidence.

25

1                   Maybe it's not very realistic to  
2     expect the prosecutor to look for evidence equally  
3     that sort of incriminates as well as exonerates the  
4     person that they are actually prosecuting. I think  
5     your mind-set -- I mean, when you actually prosecute  
6     someone, you obviously, I hope, believe in his guilt,  
7     otherwise, you shouldn't even be prosecuting him. So  
8     I think from a common-law perspective, this is any  
9     way a difficult merge. In civil law, this is also  
10    very much a civil law idea, and I thought this was a  
11    really good idea to have someone more neutral, but, I  
12    mean, maybe neutrality and prosecuting is not the  
13    easiest match.

14                   But I do think up until today, this  
15    has been a real failure, and I see -- and I'm very  
16    happy to hear comments later -- we've seen it in the  
17    DRC cases. People don't -- I mean, for instance,  
18    people from the defense side, they are not  
19    interviewed. The prosecutor's never gone to Aveba,  
20    which is where my client lives. I think that's the  
21    first place you actually look for exonerating  
22    evidence, also incriminating evidence, but they've  
23    never gone there, so I think this is all -- again,  
24    it's linked also to the problem that people don't go

25



1 enough to the fields because that's when you  
2 actually -- that's where you start.

3           Kenya, well, this has been the big  
4 issue also in the Kenya proceeding. All the defense  
5 teams have complained that exonerating evidence was  
6 not actually looked for, people were not being  
7 interviewed. May I say, just generally speaking,  
8 there are some -- at least this was the complaint  
9 from the defense, that the investigations were not  
10 fully completed.

11           And, for instance, in the case in  
12 Sang, where the defense was of the view that if you  
13 have a radio operator, he was a radio operator, where  
14 do you start? You start at the radio station to find  
15 transcripts. But they didn't do that. Instead, they  
16 relied on what witnesses had said. What we have  
17 found in terms of excerpts or transcripts have --  
18 actually, they only talk about positive things, so we  
19 haven't actually seen any transcripts of what the  
20 witnesses claim.

21           Another problem, I think, is -- and  
22 this is a problem in Lubanga and Katanga, also  
23 probably in every case, is not to check up -- not to  
24 verify your own witnesses, and so that's also how --

25

1 sometimes this is how the -- the defense can actually  
2 perhaps find these documents themselves, and so it's  
3 also not good for the prosecution because it may  
4 undermine their own witnesses. So that's, I think,  
5 what I have to say on that.

6 MR. SCHEFFER: Thank you, Caroline, and we  
7 will certainly come back to you later for more  
8 comments on what other people have said in response  
9 from the defense perspective. I wanted to start to  
10 recycle --

11 Andrew, did you want a two-finger  
12 intervention for one minute?

13 MR. CAYLEY: Sorry. Just --

14 MR. SCHEFFER: And, Diane, do you want one?

15 MR. CAYLEY: Just very, very briefly on the  
16 point that Caroline's been addressing, the  
17 exculpatory evidence. This has been a problem that's  
18 existed since 1995. I remember Mark Harmon and I  
19 spending the summer, I think, of '96, '97, going --  
20 either '96 or '97, going through ECMM, European  
21 Community Monitoring Mission reports, looking for  
22 exculpatory evidence.

23 Interestingly, all I wanted to do is  
24 to give you the perspective of a court dealing with

25

1 international crimes based exclusively on the civil  
2 law system. And although the ECCC has many problems,  
3 it's almost eliminated the problem of exonerating  
4 evidence. Why? Well, first of all, because the  
5 investigation is done by an investigating judge who  
6 is obliged under the law to examine and investigate  
7 exonerating and incriminating evidence equally. And  
8 because he's not part of the prosecution, he or she  
9 can do that completely independently. Now, whether  
10 or not that really works in practice is another  
11 question.

12 But more importantly, at the ECCC, and  
13 I believe this is the case in the civil law system,  
14 at least in some civil law jurisdictions, the defense  
15 actually have access to the entire case file, which  
16 means that you don't end up in the situation that  
17 often arose at ICTY where exonerating evidence exists  
18 for your case, but you don't actually know it's in  
19 the system. And then suddenly it pops out and you  
20 have to disclose it, and the defense inevitably makes  
21 a huge fuss, as they should, that this wasn't  
22 disclosed to them at the relevant time. So that was  
23 the only observation that I wanted to make.

24 Thank you.

25

1 MR. SCHEFFER: Thank you.

2 Diane?

3 MS. AMANN: I just wanted clarification from  
4 Caroline. When you say that there isn't sufficient  
5 verification of witnesses, are you referring to a  
6 failure or a lack of corroborating witnesses' claims  
7 by looking at documents or -- and the reason I ask is  
8 I'm wondering whether this is linked to the witness  
9 proofing issue in any sense, or if you're really  
10 talking more about the investigatory stage.

11 MS. BUISMAN: No. I'm really talking about  
12 the investigation stage, and I'll give you one  
13 example, and this is actually something that came up  
14 in our trial. We have witnesses, they claim to be of  
15 a certain age, which also happened in Lubanga, and we  
16 found birth certificates that actually undermines  
17 what they said, and, actually, now the prosecution in  
18 their closing brief have accepted the authenticity of  
19 our documents. So they actually accept now that  
20 their age was different to what they had initially  
21 said.

22 They're still relying on their  
23 mistruthful witnesses, so that's -- this is where we  
24 may not agree, but we do agree on the authenticity of  
25

1 the documents. And this is something -- the only  
2 reason why this came out is because we actually went  
3 out and investigated. Had we not found these  
4 documents, they would still have relied on these two  
5 as child soldiers. So this is where I think it's a  
6 very clear example that it's very detrimental to the  
7 defense and to international justice.

8 MR. SCHEFFER: Thank you very much, Caroline  
9 and Diane.

10 I would like to return now to Sara  
11 Criscitelli from the International Criminal Court and  
12 ask her about the experience the court had during the  
13 year 2011 with the referral by the Security Council  
14 of the Libya situation to the court, and whether  
15 having looked back at the last year, if you could  
16 describe to us what you saw as some of the advantages  
17 of that referral, perhaps some disadvantages that  
18 emerged during the year, some difficulties, some  
19 obstacles that might have been unanticipated but also  
20 might have been better dealt with by the Security  
21 Council during the year as a support arm of the  
22 International Criminal Court.

23 If you could just sort of walk us into  
24 that referral and then try to identify some of the  
25

1 issues and problems that erupted during the year.

2 MS. CRISCITELLI: Okay. I'm not sure I  
3 actually can. It's a complicated -- it's a  
4 complicated question, and a lot of it is sort of  
5 sensitive political kinds of issues. It's -- there's  
6 always an advantage -- or I shouldn't say "always,"  
7 we don't have an experience. There is an advantage  
8 to having a Security Council referral to the extent  
9 that that promotes cooperation.

10 If I can detour a little bit, and I'll  
11 do it for just, like, 60 seconds, the prosecution  
12 doesn't have its own police force. It has  
13 investigators, but it doesn't really have authority  
14 to enter into national jurisdictions and investigate.  
15 We do it with the consent and the approval of the  
16 state on which the evidence is located, and we're  
17 bound by that.

18 So just as a quick example, we can't  
19 just go to radio stations in Kenya. We need the  
20 consent of the Kenyan authorities. We have to make a  
21 formal request for assistance, and the Kenyan  
22 authorities have to approve it. So, you know, a  
23 private defense lawyer has, oddly enough, a lot more  
24 leeway in terms of investigating than the prosecution

25

1 does in this international context.

2           Back to Libya, the Security Council  
3 resolution obligates states to cooperate, and that is  
4 always a plus, and that makes the availability of  
5 assistance that much greater and certainly quicker  
6 than the absence of an obligation by the Security  
7 Council.

8           Nonetheless, the Security Council  
9 cannot guarantee that life will be safe for  
10 investigators within Libya -- you know, it's great to  
11 have a Security Council referral, but tell that to  
12 Qaddafi's forces and see how far that gets you.

13           So the Security Council referral is  
14 both a plus because it provides something of  
15 assistance, and a little bit of a negative because  
16 there's political pressure and an assumption that  
17 with the Security Council referral,        you can get  
18 what you need to get.

19           So the investigation was actually  
20 quite complicated because it is an active war zone,  
21 it's a country that doesn't particularly trust us,  
22 either side wasn't all that willing or all that open  
23 to trust, so the investigation itself, a lot of it  
24 had to be conducted extraterritorially, and the

25

1 resolution assists in that, but it doesn't solve all  
2 of the problems.

3 MR. SCHEFFER: Can you -- just to follow up on  
4 that, there's obviously now the complementarity  
5 procedure and challenge with respect to Saif al-Islam  
6 and al-Sanusi, the two surviving indicted, fugitives.

7 Can you describe to us, to the best of  
8 your scope of, you know, freedom of speech here, how  
9 that process is working out, because I know that  
10 there's potentially perhaps some tension between  
11 the -- I suppose it's the Pre-Trial chamber and the  
12 prosecutor, about precisely how to exercise  
13 discretion on complementarity, or do I have that  
14 wrong?

15 MS. CRISCITELLI: Well, I -- all right. This  
16 is going to be tricky, and I hope whatever I say here  
17 doesn't go out, you know, like on camera to the  
18 world. I have to figure out what is -- what's public  
19 and what isn't.

20 There is no complementarity challenge  
21 yet. There's no -- the national transitional  
22 authority has responded to the court in a way that  
23 the court felt was inadequate. The -- is it NTC?  
24 NTA? whatever the acronym is -- will probably come  
25



1 back to the court with something else. They  
2 responded, asking for a delay to allow them to  
3 proceed on their financial investigations and their  
4 financial cases, or case, against Saif, and they  
5 invoked the wrong statutory provision. So the  
6 chamber essentially said, "You cited 99, and it  
7 should have been 89" or, you know, whatever,  
8 "therefore, what you said is invalid, so, you know,  
9 hand him over." And the ball is back now in the  
10 Libyan authority's court.

11 It is a little bit complicated, I  
12 understand that, because they don't actually have  
13 physical custody of Saif, so their ability to  
14 surrender him is a little bit limited, and it's not  
15 entirely clear yet who is in charge in Libya. We  
16 know that Qaddafi is gone and that's about it.

17 Sanusi, I don't think -- you know,  
18 where he is, who has him, nobody seems to have  
19 resolved that yet, so there's no Sanusi  
20 complementarity issue. And as to Saif, it's very  
21 complicated. It will sort itself out, but it hasn't  
22 yet, and, you know, if the chamber asks the Security  
23 Council or reports to the Security Council to say  
24 that Libya is not cooperative, that they change  
25

1 things, but it hasn't gotten that far yet.

2                   So, it's -- I would like to think that  
3 in Rome we had some anticipation of messes like this,  
4 but I didn't. We're all sort of trying to figure out  
5 how you deal with this. So, yeah, the Pre-Trial  
6 chamber is a little bit irritated because they think  
7 the Libyan authorities are essentially not being  
8 cooperative, but it will work or not work, but it  
9 just sort of has to play itself out.

10                   It's a very, very complicated  
11 political situation. So it's not that the  
12 prosecution or the Libyan authorities are actually  
13 being defiant, it's just we're trying to figure out  
14 how this actually works in this odd kind of  
15 situation.

16                   MR. SCHEFFER: Thank you, Sara, very much.

17                   I would like to turn to Diane, if I  
18 might, on a very related issue that involves both  
19 Libya and Sudan and Kenya, all three of those  
20 situations, before the International Criminal Court  
21 and how the African Union in the year 2011 has been  
22 addressing all three situations, particularly Sudan  
23 and Kenya.

24                   Diane, could you tell us what, over  
25

1 the last year, has transpired? Has the African  
2 Union, shall we say, evolved in its perspective with  
3 regard to the International Criminal Court, or are we  
4 still today where we were a year ago in terms of the  
5 African Union's relationship with the court?

6 MS. AMANN: Well, I think we're clearly not  
7 where we were a year ago, in part because we have two  
8 more situations in Africa since a year ago. As many  
9 know in this room, the court has a terminology from  
10 the statute of when it goes into a matter or a  
11 country, it calls it a "situation," something of a  
12 placeholder, waiting for actual naming of defendants,  
13 at which point, there is a morphing into the word  
14 "case," although decisions in both the Kenya and the  
15 Libya matters make clear that even the drafters of  
16 the statute didn't always get it straight between  
17 "situation" and "case."

18 At this time last year, there was no  
19 situation in Libya. I'm not sure we would have even  
20 anticipated it. You remember the -- what has been  
21 called the "Arab Spring" began in Egypt in January of  
22 2011. It did not spread to Libya for another month,  
23 and there was quite a shock that the Security Council  
24 referred the matter in Libya, in part because three  
25

1 members of the permanent five members of the Security  
2 Council are not members of the ICC, at least two of  
3 them at various points in the last ten years have  
4 been fairly hostile, and I would say that would be  
5 China and the United States. Russia is no fan, but  
6 it really hasn't voiced much opinion one way or  
7 another. It hasn't been a player in the debate about  
8 the ICC. So we get this referral.

9           At the same time, we see the  
10 prosecutor willing to intervene in Cote d'Ivoire, all  
11 right, where there was post-election violence of a  
12 very serious nature. Eventually it sorts itself out,  
13 the new president comes in, he renews the declaration  
14 that the old president had made accepting the  
15 jurisdiction of the court, although CDI is not a full  
16 member of court, and that acceptance resulted in the  
17 old president, Gbagbo, ending up in the jurisdiction  
18 of the court.

19           That concentration of matters in  
20 Africa in the last, say, two years or so, has given  
21 rise to a critique that, to quote Jean Ping, who was  
22 the AU point person on this, had been called  
23 "discriminatory" and even "neocolonialist," that this  
24 was yet again the Western powers creating and  
25

1 maintaining and through things like Security Council  
2 referrals, even pushing an Africa docket to the  
3 exclusion of everything else. The court has another  
4 eight or so preliminary invest -- examinations in  
5 other continents of the world, but it has not moved  
6 on them. And in some cases, it has not moved at all  
7 for a very long time.

8           The Palestine national authority's  
9 request for the court to investigate the Gaza  
10 bombings dates now to 2009, and there has been no  
11 movement on that. It's a very difficult question  
12 about whether Palestine is a, quote, "state," using  
13 that word as the term of art as it occurs in the  
14 statute of the ICC. And anyone who follows Palestine  
15 knows that it's now a state at UNESCO, but it's not a  
16 state anywhere else in the international community,  
17 and it's really extraordinary to think that the  
18 drafters of the ICC threw in the lap of the court the  
19 duty and responsibility to figure out whether an  
20 entity like Palestine, or maybe one day Kosovo, is a  
21 state within the meaning of the Rome Statute. But  
22 there it is. Others are in Honduras, Afghanistan,  
23 Colombia, Korea, and a few other places.

24           So we've got this constant drumbeat,  
25

1 if you will, from people like Mr. Jean Ping,  
2 supported by both politicians and responsible  
3 academics, saying, "Why Africa? Why Africa? All  
4 you're doing is looking at Africa." And I must say  
5 that the Prosecutor's Office and the presidency of  
6 the ICC failed for a long time to have any response  
7 to that whatsoever.

8           The response of the current prosecutor  
9 frequently was one or two words to the effect of "I'm  
10 apolitical; it's not my choice. This is -- we take  
11 the case where it takes us," et cetera. They were  
12 not really content-filled, reasoned explanations of  
13 why this case and not the other.

14           That fed this description. It is  
15 unfortunate, I think everyone would agree, that not  
16 only has there not been movement into some of these  
17 other matters on other continents, but there hasn't  
18 even been a disposition of the examinations with some  
19 sort of statement of why we decided perhaps not to go  
20 forward with the examinations. So there's not a lot  
21 of, if you will, the prosecutor's version of case law  
22 on what the criteria are for choices. All of that  
23 feeds into the Africa trope.

24           That said, I think in the last half  
25

1 year or so, the ICC establishment has made inroads  
2 into that critique. You saw about midyear of last  
3 year the media finally understanding that there were  
4 two sides to that argument, at least. And so  
5 suddenly you started seeing the media saying, "We  
6 actually bothered to contact a spokesperson from the  
7 court who had a response," all right?

8           So this is not so obvious. And the  
9 response was, in various ways that evolved and, I  
10 think, got some traction, was that the reason we're  
11 in Africa in addition to the very legalistic reasons  
12 of self-referral and -- and Security Council  
13 referral, which are lost on everybody but the people  
14 in this room, in addition to those things, there are  
15 bad things happening in Africa, something like  
16 two-thirds of the states in Africa are States  
17 Parties. They want to be in the court, they want  
18 international criminal justice.

19           The people that we're going after are  
20 the people we think are most responsible for these  
21 offenses, and we're doing it on behalf of the people  
22 in Africa who are suffering from this, both in the  
23 immediate sense of having been enlisted as a child  
24 soldier, having been tortured, having had family  
25

1 members killed, and in the more, if you will,  
2 societal sense of seeing in instances, like  
3 post-election violence, democracies crumbling even  
4 before they get on their feet and simply having no  
5 chance between election and election of actually  
6 getting a government running, all right? So there  
7 are reasons to be there.

8                   Would it be nice to be elsewhere?

9 Yes. But it's not wrong to be here. And I think we  
10 began to see that moving to at least people saying,  
11 "Well, gee, maybe I have to think about this issue  
12 more." Mr. Jean Ping was not re-elected to his  
13 position at the end of last year by the AU. He  
14 almost lost to a South African woman who ran against  
15 him.

16                   Neither one commanded a plurality, and  
17 the AU has basically kicked it until, I think, their  
18 next summit in June, all right? So that suggests to  
19 me that within the AU itself, there is a rethinking  
20 among its member states of whether this critique is  
21 something they want to advance.

22                   Now, it also must be said that the  
23 fact that the new incoming prosecutor of the ICC is  
24 herself a native of Gambia, as is Mr. Jallow, Fatou  
25



1       Bensouda, that she was the top lawyer, held many of  
2       the top legal posts in her own country before  
3       entering international criminal justice, including  
4       the Minister of Justice, Solicitor General of Gambia,  
5       before she moved into the international sphere, that  
6       she helped negotiate the ECOWAS treaty, the regional  
7       treaty of the Western African States, that she took  
8       part in the ICC treaty negotiations, that she  
9       represented her state in other treaty matters,  
10      including African Union matters, has to have changed  
11      the calculus somewhat. It is much harder if someone  
12      with that background says, "We need to be in  
13      Cote d'Ivoire," and my read of it is that was largely  
14      her case.

15                       And then she delivers the head of  
16      state to the detention center here before we even  
17      know as a public matter that the man has been  
18      indicted. That suggests to me perhaps the beginning,  
19      or at least the opportunity for a beginning, of a new  
20      narrative in the sort of very old story that we've  
21      been hearing in the last two years about Africa  
22      versus the ICC.

23                       MR. SCHEFFER: Thank you, Diane, very much. I  
24      would like to get to three more people before our  
25

1 lunch break, which is just a little over ten minutes  
2 from now, and I'll just use my discretion here:  
3 Fidelma, Mark, and Hassan. So I'm going to get to  
4 those three before lunch.

5           Fidelma, very interestingly, with the  
6 Special Court for Sierra Leone, again, you know,  
7 we're awaiting the Charles Taylor judgment, but  
8 during the year 2011, there was this interesting  
9 episode of the defense seeking access or release of  
10 U.S. government cables and bringing those into  
11 evidence. Could you talk to us about the WikiLeaks  
12 episode of the Special Court for Sierra Leone in  
13 2011?

14           MS. DONLON: I can, and I'll also bear in mind  
15 that you would like to get to three of us before  
16 lunchtime, so I'll be as succinct as possible.

17           MR. SCHEFFER: Sure.

18           MS. DONLON: Just first broadly, the law, Rule  
19 92bis of the tribunal allows a chamber to admit as  
20 evidence information basically if it does not go to  
21 the proof of the act or conduct of the accused, if  
22 it's relevant for the purpose for which it's been  
23 submitted, and, finally, if its reliability is  
24 susceptible to confirmation.

25

1                   Basically the sequence of events, I  
2 believe in December of 2010, the Guardian newspaper  
3 published a series of cables to -- I believe from --  
4 originating from 2009 from the U.S. ambassador in  
5 Liberia to Washington, which had been picked up from  
6 WikiLeaks.

7                   And subsequently in January of 2011,  
8 the defense filed a motion before the chamber to  
9 reopen on the basis of 92bis for the admission of the  
10 two WikiLeaks cables, and, in addition, I believe it  
11 was an article from a Liberian newspaper called the  
12 New Democrat that contained an apology by the UN --  
13 sorry -- the U.S. ambassador in Liberia to President  
14 Sirleaf Johnson (sic), the president of Liberia. So  
15 basically in summary, that was the content of the  
16 information that the defense requested the chamber to  
17 admit.

18                   In terms of basically timing, because  
19 of the fact that these documents were only published  
20 in December in the Guardian newspaper, ultimately the  
21 chamber held that it would not have been possible,  
22 even with the exercise of reasonable diligence, for  
23 the defense to put those documents forward in their  
24 case-in-chief.

25

1                   Now, moving to the point under 92bis  
2 of the relevance of the documentation, and to  
3 specifically read from the defense motion, the  
4 defense put it to the chamber that "In terms of  
5 relevance, the cables and the apology support the  
6 defense position that the prosecution of Mr. Taylor  
7 is, in fact, political, and his indictment was  
8 deliberately selective. It will be recalled that  
9 lead defense counsel submitted during the defense's  
10 opening statement that Mr. Taylor was only indicted  
11 and arrested because of the U.S.G.'s interest and  
12 pressure."

13                   Further in that paragraph, the defense  
14 also put forward that "Mr. Taylor also testified that  
15 the U.S. also attempted to oust him in furtherance of  
16 U.S. commercial interests in the subregion."

17                   Now, in response to that motion, the  
18 prosecution argued that the U.S. cables, in fact,  
19 refuted rather than supported the defense allegations  
20 that the independence and impartiality of the Special  
21 Court is compromised.

22                   They also argued that the newspaper  
23 article had, in fact, no relevance to the trial in  
24 spite of the fact that it contained apologies -- an  
25

1 apology, rather -- and, in addition, the OTP put  
2 forward that there was nothing, no evidence contained  
3 in the documents that would support an argument that  
4 the prosecution is in breach of the duties under  
5 Article 15(1) of our statute, which effectively is  
6 similar to the provisions in the other statutes of  
7 tribunals, that the prosecutor is and will act  
8 independently and not receive any instructions from  
9 any governments.

10           Finally, I believe the prosecution  
11 noted that it was not a selective indictment, that  
12 Mr. Taylor was indicted pursuant to the discretion  
13 under Article 1-1 of our statute, which is the  
14 mandate of the Special court to indict those most  
15 responsible.

16           Finally, the outcome of the 92bis  
17 motion was that the chamber have agreed to admit the  
18 two WikiLeaks cables that were contained in the  
19 Guardian newspaper, but they did not agree to admit  
20 the New Democrat article.

21           So effectively that's where it stands  
22 at the moment. The information is admitted, but, of  
23 course, we have to remember that under 92bis, it's  
24 susceptible to confirmation, so the weight that's

25

1 given to this is a subject for deliberation by the  
2 chamber, and presumably we will see in due course the  
3 final outcome.

4 MR. SCHEFFER: And just to clarify, Fidelma,  
5 does that mean that while it's admitted into evidence  
6 and relevant to the Charles Taylor case, correct --

7 MS. DONLON: Um-hum.

8 MR. SCHEFFER: -- that there's not an oral  
9 hearing to that effect within the courtroom? In  
10 other words, that evidence is not contested and  
11 deliberated in a court proceeding. It's just a  
12 documentary piece of evidence for the court.

13 MS. DONLON: It specifically -- to what we're  
14 referring to, yes, it's documentary evidence, and I  
15 believe that the defense also indicated in their  
16 original motion that you weren't requesting any  
17 witnesses. So it is documentary.

18 MR. SCHEFFER: I see.

19 MS. DONLON: Yes.

20 MR. SCHEFFER: So it may have some bearing on  
21 the final judgment that we see from the Trial  
22 chamber; is that correct?

23 MS. DONLON: That's a matter to be  
24 deliberated. It has been --

25

1 MR. SCHEFFER: Exactly. Yeah.

2 MS. DONLON: The two cables specifically have  
3 been entered into evidence, and, again, the test that  
4 it's relevant for its purpose --

5 MR. SCHEFFER: Yes.

6 MS. DONLON: -- that was satisfied, so the  
7 outcome is for the judges.

8 MR. SCHEFFER: Okay. Very good.

9 MS. DONLON: Thank you.

10 MR. SCHEFFER: I would like to turn to Mark  
11 Harmon. Two very significant judgments came down  
12 from the Yugoslav Tribunal this year, Mark -- I mean,  
13 in the year 2011, one with respect to a Croat general  
14 by the name of General Gotovina, and the second with  
15 respect to a Serbian defendant by the name of  
16 Mr. Perisic, the Gotovina dealing with Operation  
17 Storm in 1995, and the Perisic judgment dealing with  
18 the siege of Sarajevo and Srebrenica.

19 A rich range of issues dealt with in  
20 both of those judgments, and I'll just quickly  
21 mention with Gotovina, there's this new view of what  
22 can constitute the crime of deportation and how one  
23 understands that, and with the Sarajevo and  
24 Srebrenica judgment on Perisic, new understandings

25

1 about aiding and abetting with respect to war crimes,  
2 what it means with a failure to punish subordinates,  
3 and aiding and abetting extermination at Srebrenica.

4           You don't necessarily have to touch  
5 all of those, but just give us from your perspective  
6 sort of the most significant of aspects of those two  
7 judgments.

8           MR. HARMON: David, thank you. I was a  
9 prosecutor in the Perisic case and not in the  
10 Gotovina case, so I'll start with the Perisic case  
11 because I know it best.

12           Perisic was a case that we charged  
13 General Perisic, who was the chief of the VJ General  
14 Staff; in other words, the Army in the Federal  
15 Republic of Yugoslavia, for aiding and abetting  
16 crimes that were committed in Bosnia and Herzegovina  
17 and in the Krajina area of Croatia.

18           We alleged that he had assisted by  
19 providing practical assistance in the form of  
20 materiel, logistical support, by providing personnel,  
21 and by sending troops directly into Sarajevo to  
22 participate in the siege in late 1993 and early 1994.  
23 The decision of the Trial chamber was a split  
24 decision, two judges voting for conviction and Judge  
25



1 Moloto dissenting from that conviction.

2           The second element of the Perisic  
3 case, we alleged Superior Responsibility for crimes  
4 committed in Sarajevo, Srebrenica, and in Zagreb; in  
5 other words, we alleged that General Perisic was the  
6 superior officer of the personnel who committed the  
7 crimes in the Bosnian-Serb Army and the Republika  
8 Srpska Krajina Army.

9           The court rejected -- acquitted  
10 General Perisic of Superior Responsibility over the  
11 VRS, but convicted him under Article 7(3) for  
12 Superior Responsibility over the SVK, or the Army in  
13 the Krajina area. It did so in that respect on the  
14 basis of an analysis of the evidence that was  
15 presented to it, which included written orders, it  
16 included the disciplinary proceedings that had been  
17 implemented by General Perisic and the general staff  
18 over members of the Krajina Army. It's interesting  
19 to note that General Perisic, who had -- and we  
20 alleged and was proved, had superior authority over  
21 the members of the Bosnian Krajina Army.

22           After the crimes that were committed  
23 by them; in other words, lobbing Orkan rockets into  
24 the city center of Croatia, in May, May 2nd and May  
25

1 3rd, of 1994, General Perisic did nothing. However,  
2 in November of 1995, when the Krajina was retaken by  
3 the Croats and the RSK, Republika of Serbian Krajina,  
4 collapsed, then he took action against his  
5 subordinates for various derelictions of duty. So  
6 that was a distinguishing feature in terms of the two  
7 judgments.

8 In terms of aiding and abetting, the  
9 background of the aiding and abetting case involved  
10 the following: When the conflict started in Bosnia  
11 and in Croatia, ultimately the Yugoslavian People's  
12 Army, the JNA, withdrew, and people who had served in  
13 those armies continued to participate in the war on  
14 behalf of the Serbs in two nascent armies, the VRS  
15 and the SVK.

16 The problem for the commanders of  
17 those new armies was that people would essentially  
18 pick up and leave and go back to the Federal Republic  
19 of Yugoslavia, and if you're a commander of an army,  
20 and you have your critical manpower starting to be  
21 depleted because somebody says, "You know, I've had  
22 enough of this war, I'm going home," then that causes  
23 a problem in an operational sense.

24 Consequently, General Mladic asked  
25

1 General Panic, who was Perisic's predecessor as the  
2 chief of the Yugoslav Army, to implement some --  
3 implement two things: One, that anybody who served  
4 in the VJ who was born in Bosnia, had to serve in  
5 Cro -- anybody who was born in Bosnia -- I'm trying  
6 to get through this very quickly -- anybody who was  
7 born in Bosnia who was serving in the VJ, had an  
8 obligation to go back to the VRS and serve in that  
9 army, and he also asked that those people be fully  
10 compensated, their salaries be paid, they be  
11 supported, benefits, et cetera. Panic did nothing.

12 But when Perisic became chief of the  
13 VJ General Staff, he did something, and it's all  
14 described in the indictment. But the long and short  
15 of it was he prepared and created two personnel  
16 centers which were formations within the VJ General  
17 Staff, and if you were a Yugoslav Army officer who  
18 were born in Bosnia, rather than be directly assigned  
19 to Bosnia, you would be assigned to the personnel  
20 center in Belgrade. That was a way to avoid  
21 sanctions and the like.

22 But we and the court found that he had  
23 provided significant assistance to the perpetrators  
24 of the crimes in both Sarajevo and Srebrenica by  
25

1 providing personnel.

2           Second of all, he continued to supply  
3 and streamline this process of supply of logistics  
4 materiel to the two armies -- I'm sorry -- to the  
5 Sarajevo Romanija Corps, the Corps responsible for  
6 committing crimes in Sarajevo; and to the Drina Corps  
7 and to the VRS.

8           Lastly, we had evidence to show that  
9 he sent VJ Special Unit Corps troops directly into  
10 the combat in Sarajevo. So those are the outstanding  
11 and very broad-stroke elements of the Perisic case.

12           In the Gotovina case, the Gotovina  
13 case charged -- and, as I say, I didn't prosecute  
14 this case -- but charged that there was forcible  
15 displacement of people in the Serbian Krajina. To  
16 understand this background, parts of understand this  
17 background, parts of Croatia had been taken over by  
18 Croatian Serbs. In fact, they occupied one-third of  
19 the territory of Croatia, and the Croatian state was  
20 interested in recovering their territory.

21           And in 1995, they had two major  
22 military operations, the purpose of which in part was  
23 to eliminate the Serbs from the territory. And  
24 you'll have to read the judgment to understand the  
25

1 evidence, but there had been an agreement that the  
2 purpose of this operation in part not only was to  
3 reclaim the territory, but expel the Serbs. They did  
4 that through a -- two different ways, and the  
5 prosecution alleged two different bases, one was that  
6 there would be a shelling of civilian targets, civil  
7 population centers and the like, which would then  
8 cause sufficient fear and move people out.

9           They also, the prosecution, alleged  
10 that the removal of people would be through a series  
11 of -- I mean, there would be crimes that would be  
12 committed that would not be redressed: murder, rape,  
13 burning of houses, burning of religious sites, et  
14 cetera.

15           Now, the concept that this case stands  
16 for now in part is forcible removal by shelling. But  
17 my own personal view is that's not new. I mean, in  
18 terms of forcible removal, there's certain elements:  
19 You have to apply force designed to eliminate -- to  
20 remove people from a place where they are lawfully  
21 entitled to be.

22           And so whether you use force by means  
23 of targeting civilian population centers as the  
24 method to get rid of people or whether you send in  
25

1 paramilitary forces to burn every house in the  
2 village or whether you send in -- you do symbolic  
3 killings in the central square in order to drive  
4 people out, the point is that forcible removal or  
5 deportation -- there's a difference, and I won't go  
6 into the legal distinction -- but is the result of  
7 the application of means through which people leave.  
8 So that was the situation in the Gotovina case.

9           Now, there are some cases obviously  
10 where you can use force to remove the civilian  
11 population: In times of exigent military  
12 circumstances or for purposes of safety, but under  
13 those circumstances, international law says you have  
14 to permit them to return and the removal can only be  
15 temporary. In this case, it was a designed plan to  
16 create essentially a territory that would not have  
17 many Serbs or not an effective number of Serbs.

18           In the Krstic case, again, Allan --  
19 Andrew and I were involved in that case. Although we  
20 didn't plead it, there was evidence, again, of  
21 shelling that was used to move the population from  
22 the town of Srebrenica to the town of Potocari. In  
23 this case, it was explicitly alleged that that was  
24 the method of forcible -- of deportation and forcible

25

1 removal. Thank you.

2 MR. SCHEFFER: Thank you.

3 Hassan, I'm going to come to you  
4 immediately after lunch, okay, because we have to  
5 break because the videotape is expiring.

6 But I did want to just say on  
7 Gotovina, this was someone who was and remains  
8 extremely popular in the Croatian society. His  
9 conviction created an uproar in Croatia, and I think  
10 one of the issues that you might want to come back  
11 to, Mark, when we come back, is, as I recall, there  
12 was the whole JCE3 issue in the conviction of  
13 Gotovina, which the government of Croatia was very  
14 opposed to in terms of how that came out in the  
15 judgment, that he was, in fact, convicted on a JCE3  
16 basis. I might stand corrected on that, but I  
17 believe I recall that correctly, and that was a huge  
18 issue for the government last year.

19 We have lunch now, and the panelists  
20 and I will -- we're going to have lunch together and  
21 everyone else is going to joyously have lunch at --  
22 in the location downstairs, and we'll see you all  
23 back here at 2:00 o'clock. Thanks a lot.

24 (WHEREUPON, Disk 3 ended.)

25

1 (WHEREUPON, a lunch break was  
2 had.)

3 MR. SCHEFFER: Okay, everyone. Welcome back  
4 to this afternoon session of the Atrocity Crimes  
5 Litigation Year-in-Review Conference regarding the  
6 calendar year 2011, and the jurisdiction --  
7 jurisprudence and practice of the major International  
8 Criminal Tribunals; namely, the International  
9 Criminal Tribunals for the former Yugoslavia, and for  
10 Rwanda, the Special Court for Sierra Leone, the  
11 Extraordinary Chambers in the Courts of Cambodia, the  
12 Special Tribunal for Lebanon, and the International  
13 Criminal Court, and welcome to all of the judges of  
14 various courts who have also joined us here today;  
15 we're very honored to have you with us, and all other  
16 visitors from afar and near.

17 We have a panel of expert  
18 practitioners as well as academics in front of you,  
19 and I introduced them this morning, and you can  
20 easily look at your program for their backgrounds  
21 again.

22 Now, what I'd like to do is this: We  
23 left one thing off from the morning session, which  
24 was I wanted to get to Prosecutor Jallow to -- from  
25



1 the International Criminal Tribunal for Rwanda to  
2 discuss one particular case. It may not have hit  
3 your radar screen, but it was the judgment against  
4 Jean-Baptiste Gatete on March 31, Carm, 2011, at the  
5 International Criminal Tribunal for Rwanda. He was  
6 found guilty of genocide and extermination as a crime  
7 against humanity, but there were a couple of issues  
8 in this case that I thought the prosecutor might wish  
9 to explain to us because I think they're interesting.

10           There was a seven-year delay in  
11 holding this trial, and I think we should understand  
12 how the court handled that particular issue because  
13 that's an extraordinarily long period, and I'm sure  
14 that defense counsel would have strong views on that  
15 issue as to why no prejudice is actually shown by  
16 such delay, and also there was the absence of one of  
17 the judges for a particular period of time as well as  
18 the prosecutor arguing in that case that a particular  
19 inference should be drawn from the accused's silence  
20 in the courtroom, and the court agreeing with the  
21 defense that no such prejudicial inference should be  
22 drawn from the accused's silence.

23           Hassan, if you could address some of  
24 those issues; I think they're interesting, somewhat

25

1 technical, but interesting issues, that arose from  
2 that case and then we will broaden it into the  
3 afternoon agenda of issues.

4 MR. JALLOW: Thank you. I think before I go  
5 into the Gatete -- we call it Ga-TAY-TAY  
6 (phonetic) --

7 MR. SCHEFFER: Ah.

8 MR. JALLOW: -- Gatete case, just a few  
9 comments on the issue of disclosures which had been  
10 covered, come up early in the morning, particularly  
11 in the Bizimungu case. That was a case where when  
12 the proceedings had concluded, had closed, and the  
13 case had been adjourned for judgment, well after it  
14 had been adjourned for judgment, the defense required  
15 the OTP to disclose certain material which they  
16 allege was exculpatory, and upon its disclosure, the  
17 judges took the view that it was exculpatory and they  
18 acquitted two of the accused for non -- because the  
19 prosecution had not disclosed this material.

20 Initially, at the 98bis-level stage of  
21 the proceedings, the judges had found that the  
22 prosecution had established the case on those  
23 particulars against the two accused. I think  
24 Madam -- she raised -- she mentioned it earlier on,  
25

1 and we've always felt that the acquittal on -- of the  
2 accused on those two particulars was not the only  
3 option.

4           When the material had been disclosed,  
5 we thought the prosecution and the witnesses  
6 themselves concerned should have been given the  
7 chance, they should have been recalled to see whether  
8 they could give an explanation for the incon --  
9 apparent inconsistencies in their statements or in  
10 their testimony, but the court did not recall the  
11 witnesses, nor were there any addresses by counsel on  
12 the issue.

13           The court felt that it was too late in  
14 the day to reopen the case and instead proceeded to  
15 acquit after initially finding that the prosecution  
16 evidence was overwhelming. I think they should have,  
17 in the interest of justice, and bearing in mind the  
18 interest of the victims also, should have recalled  
19 the witnesses in order to address the issue more  
20 fully.

21           In a way, as I alluded to in the  
22 morning earlier, completion strategies actually  
23 sometimes impact on the process of justice. I think  
24 if there wasn't a kind of deadline for us to finish

25

1 these trials, these cases, the judges could have  
2 taken a different position and recalled the  
3 witnesses.

4           So it was an option that was open to  
5 the judges, to recall the witnesses or to have  
6 counsel address the court on the significance or  
7 otherwise of these inconsistencies instead of simply  
8 acquitting them.

9           Where on the Gatete case it's  
10 interesting because of these three issues you've  
11 raised: There was first the issue of the delay, a  
12 delay of some seven months in bringing him up for  
13 trial and so on. He had raised an objection that his  
14 rights had been violated, but it came quite late in  
15 the day. It was only in the closing brief, in his  
16 own closing brief, that he had raised the point, and  
17 the court felt that was rather late in the day  
18 because the trial had already almost been concluded.

19           And there are other reasons, too, why  
20 the delay took place. The case had been earmarked  
21 for referral to Rwanda under Rule 11bis of our rules.  
22 Sometimes the delay was caused partly by the  
23 prosecution, particularly, I think, in relation to  
24 amendment of the indictment. There were delays in  
25

1 the Trial chamber scheduling the case itself.

2 But at the end of the day, his  
3 complaint was dismissed on the basis that he had not  
4 demonstrated that the delay caused him any loss of  
5 witnesses or evidence. He could not show that  
6 because of the delay, he was unable to access  
7 witnesses or access other evidence in his own  
8 defense. And, of course, we agreed with the Trial  
9 chamber on this point.

10 The second issue related to the  
11 absence of the judge of -- one of the judges from the  
12 three-judge panel for a period of time. Rule 15 of  
13 the rules allows two judges of the panel to continue  
14 for a period to hear the evidence, and that happened  
15 in this case, and he complained that his right to a  
16 fair trial basically had been violated.

17 Some -- about a dozen witnesses, I  
18 believe, had been heard by these two judges in the  
19 absence of the other judge, but the proceedings, of  
20 course, had been video recorded and they were  
21 available to the third judge when he came on board.

22 What was important, I think, and which  
23 is true, is that the Trial chamber pointed out that  
24 videotapes are important in terms of demeanor,  
25

1 observing demeanor of the witness, but demeanor is  
2 not the only consideration that the judge takes into  
3 account in deciding on the credibility of the  
4 witness, and that in any case, in this particular  
5 instance, the accused had not demonstrated that the  
6 demeanor of those witnesses was crucial, and that  
7 because the judge was absent, he could not properly  
8 assess that.

9                   So he really had not laid a good basis  
10 to show that his right to a fair trial, you know, had  
11 been violated by this prolonged absence of the third  
12 judge. So he lost on that point as well.

13                   And we lost on the third point, which  
14 was that he did not testify in his own defense.  
15 Instead, he called witnesses. And in our own closing  
16 brief, we had invited the judge to draw an adverse  
17 inference from the fact that he failed to testify.

18                   I do remember years back watching one  
19 customary court in my part of the world, and the  
20 accused came up. At the close of the case for the  
21 prosecution, the traditional court members asked him,  
22 "What do you have to say?" And he said, no, he  
23 didn't have anything to say. And they said, "What?  
24 You don't have -- you don't have anything to say?"  
25

1 How can you not have anything to say? You're the  
2 accused."

3 We are almost, I guess, operating in  
4 that manner. But the judges felt, no, they couldn't  
5 draw an adverse inference because he cannot be  
6 compelled to testify and he has a right to decide  
7 whether to testify or not to testify, and also there  
8 is no -- there needs to be a specific expressed  
9 provision in the statute which would enable them to  
10 draw that sort of adverse inference, so we failed to  
11 convince the judges to draw that adverse inference.

12 But, nonetheless, he was convicted at  
13 the end of the day, despite all these three issues.  
14 It's now on appeal, and we are hoping that maybe by  
15 May there will be oral hearings on the case itself.

16 MR. SCHEFFER: Hassan, are you appealing any  
17 part of that judgment?

18 MR. JALLOW: No, we are not appealing any --

19 MR. SCHEFFER: Okay.

20 MR. JALLOW: -- part of the judgment.

21 MR. SCHEFFER: Okay.

22 MR. JALLOW: No.

23 MR. SCHEFFER: Diane, you had a question for  
24 him?

25

1 MS. AMANN: Yeah. I would just add as a  
2 contextualization, although surely for people who are  
3 trained in the U.S. criminal law system, the notion  
4 of drawing adverse inferences is quite alien, but, in  
5 fact, by statute, it is now legal in England, and so  
6 it is perhaps a more complex question than it would  
7 seem for others, although apparently not for the  
8 judges.

9 I have a question that deals with what  
10 you alluded to earlier, the completion strategy. And  
11 I would like to point out that I just confirmed with  
12 you that you have been elected the Prosecutor of the  
13 Residual Mechanism for the Rwanda and the Yugoslavia  
14 Tribunals, and you'll be serving along with Theodor  
15 Meron, who is the president of ICTY, who will become  
16 the President of the Residual Tribunal. So they are  
17 really beginning to work.

18 And, of course, one part of the  
19 completion strategy surely for the ICTY, and  
20 aspirationally at least for the ICTR, has been  
21 transferring some cases back to the national  
22 jurisdictions, and it had looked even at the time  
23 that our crib sheet briefs were prepared, that you  
24 had finally succeeded in transferring Mr. Uwinkindi

25



1 to Rwanda for trial, and it would have been the first  
2 time that happened.

3                   But I read just in the last couple of  
4 weeks now that that transfer has been stayed by the  
5 chamber, the reason apparently being an inability to  
6 reach an agreement with the African Commission on  
7 Human and Peoples' Rights to serve in a way that  
8 satisfies the court as a monitor for that. That  
9 seems to me to be a troubling obstacle, and I wonder  
10 if you might comment on that.

11                  MR. JALLOW: Well, I think you're right. On  
12 the issue of silence, I mean, the tribunals may take  
13 one view, but other legal traditions take a different  
14 position. As I mentioned, for instance, with our own  
15 customary courts, they do take a different position,  
16 I think the common law also has evolved significantly  
17 in that particular area.

18                   Last year we were able to get the  
19 referral of the case of Uwinkindi to Rwanda after  
20 several years of effort. And since then, we've also  
21 got a decision in the case of Kayishyema, which was  
22 confirmed -- well, confirmed only last week with the  
23 expiry of the time for appeal, so we have two cases  
24 which have now been referred to Rwanda.

25

1                   At the time of the referral of  
2   Uwinkindi, the Referral chamber had identified the  
3   African Commission on Human and Peoples' Rights as  
4   the monitors and had requested the Registrar of the  
5   Court to work out the modalities with the Commission  
6   for them to effect the refer -- the monetary.

7                   There's been a delay in the Registry  
8   and the Commission reaching agreement on the  
9   logistics and the conditions for effecting that  
10   monetary, and that's what's held back the referral.  
11   They had discussions ongoing, and, also, at the same  
12   time, there are other -- there are efforts to explore  
13   alternatives to the Commission in terms of monetary.  
14   I expect this will be settled probably this week. It  
15   may be settled this week. The Court has asked the  
16   Registrar to file by tomorrow, you know, his -- the  
17   outcome of his discussions with the Commission and  
18   his exploration of other alternatives to the  
19   Commission. He should be filing that tomorrow, and  
20   then we'll expect a condition from the Commission --  
21   from the Court itself shortly.

22                   But the Principle of Referral has not  
23   been challenged. It's been decided by the Court of  
24   Appeals finally that the referral should take place.

25

1 It's just a matter of working out the logistics and  
2 the conditions for the monetary.

3 MR. SCHEFFER: Thank you, Hassan.

4 I wanted to just introduce a short  
5 conceptual break in our discussion. As all of you  
6 probably are aware of by now after it's been out, oh,  
7 for, what, ten days or for nine days, the Kony 2012  
8 video, which is sweeping YouTube -- and which I'm  
9 sure every single one of us has watched by now -- is  
10 something we should simply take note of.

11 It has considerable significance, I  
12 think, both in a, shall we say, procedural way as  
13 well as a substantive way in terms of bringing  
14 incredibly sharp focus on a key priority of the  
15 International Criminal Court in a way that nothing,  
16 any of the rest of us has ever done, has now  
17 accomplished, which is the priority of arresting  
18 Joseph Kony and his colleagues, who are indicted, at  
19 the LRA, and that is very, very fortunate. Of  
20 course, it's been subjected to some criticism as  
21 well.

22 But we have with us a member of the  
23 generation that was immediately seized with this.  
24 You know, my daughter is a freshman at the University  
25

1 of Wisconsin-Madison, and within hours, a week ago  
2 from Monday when Kony 2012 hit the YouTube, I  
3 received an e-mail from her, and, of course, she's  
4 very aware of what I do for a living, and she said,  
5 "Dad, everyone here watching Kony 2012. This is what  
6 you do, watch it."

7 (WHEREUPON, there was laughter.)

8 And so I was immediately sensitized to  
9 what was sweeping the university campuses of America.  
10 And we have with us Diane's son, Tiernan, and --  
11 Tieran (sic), right?

12 MS. AMANN: Tiernan.

13 MR. SCHEFFER: Tiernan. Yeah, Tiernan.

14 MS. AMANN: Tiernan O'Neill.

15 MR. SCHEFFER: Tiernan O'Neill.

16 And, Tiernan, would you like to come  
17 up for just one second and talk about the impact of  
18 Kony 12 (sic). I think this mic will work for you.

19 MR. O'NEILL: Sure. Well, Kony, 2012, as you  
20 know and as David said, is a YouTube video by the  
21 Invisible Children Foundation that has really swept  
22 YouTube, and I believe to date has had over 77  
23 million views on YouTube, which is quite a  
24 significant number.

25

1           I think that the reason that it's so  
2 successful reaching out the message of Kony 2012 is  
3 that they used sort of a new con -- a new form of --  
4 well, not necessarily new, but new for the subject, a  
5 new form of media to get the -- raise awareness about  
6 the ICC and international law.

7           So -- and they actually asked the  
8 public to do something, which is -- made sort of a --  
9 which made the international laws available to the  
10 masses, and that is something that I think is very  
11 difficult to do, especially with this subject.

12           And I -- there is criticism about  
13 them, that they aren't going after, say, Bashir or  
14 any other people, but I think with one warlord that  
15 gets a lot of attention and is sought after, then  
16 comes the rest, you know?

17           And the more -- the more that you can  
18 use this medium, YouTube being it, or just make  
19 the -- advertise sort of the ICC. They could have  
20 put, you know, "Donate ten dollars; these are some  
21 other foundations that are trying to reach the same  
22 goals," and that's what, I think the ICC needs to do  
23 to be aware to the greater population.

24           Thank you.

25

1 (WHEREUPON, was there applause.)

2 MR. MORLEY: David, could I just mention that  
3 checking my Facebook account this morning, I got  
4 seven references from different parts of the world to  
5 watch Kony 2012, so this thing is going viral through  
6 the social networking sites.

7 MR. SCHEFFER: You know, what I would like to  
8 do, too, is -- it's always difficult with this  
9 particular format to have enough time to get to  
10 everything, but one thing we must make time for is to  
11 offer all of you an opportunity ask us some  
12 questions, and, frankly, I would like to take that  
13 opportunity right now.

14 If any of you would like to pose a  
15 question, we can take one or two now, and then we'll  
16 continue onwards with another round of internal  
17 questioning and then shoot it back to the audience.  
18 Phil Sandick from Northwestern Law here, who is  
19 interning at the ICC and one of my students, will  
20 bring you the mic.

21 Do we have a question from the  
22 audience to any of our panelists on any of the  
23 subjects that pertain to their respective tribunals?  
24 Anything that -- yes. Right here (indicating).

25

1 MR. POWDERLY: Hi, how's it going? My name is  
2 Joe Powderly; I'm assistant professor at Leiden  
3 University. I probably have a question for all of  
4 you, but I'll limit it, my question, to Mark Harmon,  
5 and, in particular, the Perisic case.

6 I thought that judgment was  
7 particularly interesting and particularly interesting  
8 for what it said about aiding and abetting, and what  
9 also makes it most curious is Judge Moloto's dissent  
10 where he attempts in about 25 pages to say that the  
11 standard adopted by the Trial chamber, by the  
12 majority of the Trial chamber, equates to prohibiting  
13 or -- or criminalizing the waging of war and that it  
14 sets an unclear precedent for future prosecutions.

15 I'm just wondering what your opinion  
16 is of Moloto's dissent, and also whether with  
17 hindsight, perhaps aiding and abetting may not have  
18 been the best form of liability to attempt to attach  
19 to the crimes. Perhaps -- looking at the judgment,  
20 it seems that if JCE had been charged, we wouldn't be  
21 talking about a dissenting opinion in this instance.

22 I've one other question for Iain  
23 Morley. Iain, you spoke quite positively about the  
24 terrorism decision, but you led arguments before the  
25

1 Appeals chamber arguing that you felt no such  
2 definition was necessary, that there was no such  
3 lacuna. You were joined in that opinion by defense  
4 counselor, at least those representing the defense.

5 I was just wondering, you know, what  
6 is your personal opinion of the judgment, whether  
7 it's actually going to make your life easier or more  
8 difficult in the coming years?

9 MR. MORLEY: Gee, thanks, Joe.

10 (WHEREUPON, there was laughter.)

11 MR. SCHEFFER: Why don't we start with Mark  
12 Harmon on the Perisic case.

13 MR. HARMON: Well, I'm going to be very  
14 circumspect. The case, Perisic, is on appeal, and I  
15 don't care to comment much on the case, given its --  
16 the appeal is pending. Judge Moloto wrote a  
17 well-reasoned, vigorous dissent. He contended that  
18 the majority had conflated aiding and abetting with  
19 JCE. Having tried the case, I like to think that the  
20 majority is correct, but that's the Appeals chamber  
21 to make decisions on.

22 I don't have -- really, I don't have  
23 any other comments on that. I'm not going to go to  
24 that point. I just received the appeals brief, the  
25



1 draft, last night, so I'm going to look at that.

2 And your other question related to --  
3 was there another question?

4 MR. SCHEFFER: It was for Iain. Yeah, it was  
5 for Iain.

6 MR. HARMON: No. I thought there was another  
7 part to your question.

8 Thank you.

9 MR. MORLEY: Terrorism. First of all, from  
10 where I come from, we're not in the habit as  
11 barristers of second-guessing or offering alternative  
12 thoughts to the decisions of their Honors and their  
13 Lordships, so I'm not going to be embarking upon an  
14 analysis of what in my personal opinion is or is not  
15 a good thing. My personal opinion is, of course,  
16 irrelevant, and it should be.

17 On the subject of what was argued, I  
18 was, in fact, arguing against there being a  
19 requirement to find as an element a political motive,  
20 and I succeeded in, I think, persuading the Bench  
21 that no political motive needs to be an element of  
22 the offense of terrorism, the logic being that if you  
23 have to prove a political motive, you're going to  
24 disappear down the rabbit hole with regard to calling

25

1 evidence about things which will open the trial  
2 process into a political event. So that was the  
3 primary concern of the OTP, and we succeeded, I  
4 think, in respect of that.

5 We are, of course, very grateful for  
6 the definition of "terrorism," which has been put  
7 forward in the decision of the 16th of February,  
8 2011. It does provide some clarity with regard to  
9 the essential features as spread through customary  
10 international law and a variety of treaties. And the  
11 fact that there's been a moment in time when the  
12 different features have been drawn together into a  
13 single judicial pronouncement is, of course, welcome.

14 And that's as much as I think can be  
15 said on the subject, because I don't think it is a  
16 controversial subject. There is an argument as to  
17 whether or not a definition was needed. But there  
18 being one, it is welcome.

19 Thank you.

20 MR. SCHEFFER: Let's take perhaps one more  
21 question and then we'll go into another round here.  
22 Anyone else who would like to pose a question? Yes,  
23 Linda. State your name.

24 MS. KELLER: Hi, I'm Linda Keller. I'm from  
25

1 Thomas Jefferson School of Law, I'm currently a  
2 visiting professional at the ICC.

3 My question is actually for Diane to  
4 follow up on your take with regard to the ICC and  
5 African Union, although other panelists are welcome  
6 to jump in.

7 I was wondering how -- it seemed that  
8 you were seeing at least a potential thawing in  
9 relations between the African Union and the ICC, and  
10 I was wondering how that might square with the more  
11 recent African Union statements in the wake of the  
12 Pre-Trial chamber's referral of Malawi and  
13 subsequently Chad for noncooperation in terms of  
14 arresting al-Bashir.

15 MS. AMANN: Thank you, Linda. I think that  
16 there may be a thawing or there may not. I think I  
17 said something to the effect of an opportunity for a  
18 new narrative, or I tried to couch it that way.  
19 There is still a lot of friction and a lot of  
20 tension, and not unjustifiably so.

21 I would also note that it was quite  
22 striking to me that the very first governmental-leg  
23 entity to welcome Mr. Hussein to make a visit to its  
24 country after his very recent indictment as the  
25

1 newest defendant in the Darfur situation was the  
2 National Transitional Council of Libya, and I think  
3 this is one of a couple of times now that the  
4 Libyans, who are trying to consolidate power in  
5 Tripoli post-Qaddafi, have shown that they are  
6 willing to put some thorns in the side of  
7 international criminal justice, and I -- it seems a  
8 bit embarrassing or at least an effort to create some  
9 source of embarrassment, so that I think the friction  
10 is still there.

11           There are a number of member states in  
12 Africa who continue to give safe passage to Bashir.  
13 I think you mentioned Chad, Malawi. Kenya now, of  
14 course, has, after having given him safe passage for  
15 a couple of times, has -- its court or judicial  
16 system has issued an arrest warrant should he return,  
17 but, as I understand it, that's on appeal in the  
18 national system at this point.

19           The fact that that came out of  
20 anywhere in Kenya given the astounding attention  
21 that's been given in Kenya to the ICC in the last  
22 year or so itself shows just the dynamism and  
23 conflict and perhaps unpredictability of the way it  
24 will grow.

25

1                   My guess is if we see some of these  
2 other matters being disposed of in a responsible way,  
3 either the opening of investigations, better  
4 explanations as to why investigations are or are not  
5 going forward, we see things like cases coming to  
6 judgment as we saw this morning, so that there's some  
7 closure on these matters, right, that that will  
8 contribute or make it more difficult for the critique  
9 that was very, very active last year to have as much  
10 force as it does, so that I don't think we have --  
11 we're in any way able to close the chapter, but I  
12 think the story is becoming more interesting and more  
13 complex, and the ending may look different than it  
14 did at this time last year.

15               MR. SCHEFFER: And, finally, Diane, you wanted  
16 to raise one point regarding the Gotovina judgment?

17               MS. AMANN: Yes. Again, I just wanted to  
18 mention that there is a wrinkle in the Gotovina case  
19 that may be worth watching, again, for folks who are  
20 interested in other interventions in the world,  
21 particularly those related to counterterrorism  
22 measures, not only by the United States but also by  
23 its allies.

24                   The appeals process is in play right  
25

1 now in the Gotovina case, and one of the amicus  
2 briefs that has been filed has been filed by multiple  
3 former military offices and present military experts  
4 of the United States challenging one of the findings  
5 of the tribunal.

6           As I understand it, this issue of  
7 targeting, of determining whether the shelling had  
8 occurred in such a way that it constituted an attack  
9 on the civilian population, was defined by a ratio in  
10 which 95 percent of the targeting decisions were  
11 against pure military targets, five percent were  
12 against nonmilitary targets, and that was held to be  
13 sufficient for a finding of attack on a civilian  
14 population.

15           I think anyone who has followed the  
16 targeted killing issues in the United States and the  
17 controversy over drone killings can understand why  
18 present and former military officers in the United  
19 States are very concerned about a finding that a  
20 casualty rate in that kind of ratio is sufficiently  
21 of concern to the international community, that there  
22 could be a finding of the war crime of a targeted  
23 killing attack on a civilian population.

24           So the brief filed by people like Gary  
25

1 Solis, who teaches laws of war at Georgetown, having  
2 taught many years at West Point and a dozen or so  
3 others, goes through the entire law of armed conflict  
4 and tries to argue that this was an incorrect ruling.

5           So that is an angle that I think at  
6 least many of us in the United States will be  
7 following quite -- and many in NATO all around the  
8 world, will be following quite closely as we look at  
9 that appeals judgment.

10           MR. SCHEFFER: Mark, do you want to add a word  
11 to that?

12           MR. HARMON: Yes. The report filed by the 12  
13 military experts, as I understand, included one of  
14 the defense experts in the Gotovina case itself.

15           Second of all, the application to have  
16 the Appeals chamber accept that brief, the Appeals  
17 chamber rejected the brief and it is no longer  
18 something under consideration by the Appeals chamber.

19           MR. SCHEFFER: I did not know that. When did  
20 that happen? Two weeks ago?

21           MR. HARMON: Yeah. Um-hum.

22           MR. SCHEFFER: That's in -- okay. News.

23           I would like to turn to Sara  
24 Criscitelli. Let's go back to the International  
25

1 Criminal Court. Sara, we're going to turn our  
2 attention to Kenya. Rulings in the year 2011 on  
3 Kenya whereby the concept of a network among alleged  
4 perpetrators was at issue and the relationship  
5 between what constitutes a network and what  
6 constitutes the more conventional type of entity we  
7 look to for planning purposes and organization of  
8 some character, that all came to judgment in the  
9 Kenya case, or a decision in the Kenya case.

10           Could you speak to that as well as to  
11 Judge Hans-Peter Kaul's dissent in Kenya where he  
12 simply could not find the organizational basis for a  
13 crime against humanity in Kenya? What happened in  
14 2011 that gave us greater insight on that issue?

15           MS. CRISCITELLI: I'm not sure I understand  
16 the last question, "What happened in 2011?" But I  
17 should say that both cases are up on appeal. The  
18 statute provides for an automatic right of appeal as  
19 opposed to a request for permission to appeal in  
20 jurisdictional issues, and the defense has claimed  
21 that the organizational component is jurisdictional,  
22 and, therefore, the defense in both cases exercised  
23 its automatic statutory right.

24           We just, I think, maybe Monday? Last  
25



1 week? Something, fairly recently -- it's all sort of  
2 a blur, it's been very busy -- we filed our briefs in  
3 response to that. So the issue is currently before  
4 the Appeals chamber.

5           The dissenting judge, both at the  
6 point where we requested authorization -- not both.  
7 At the time we requested authorization to investigate  
8 on the issuance of the arrest warrants and at the  
9 confirmation stage, Judge Hans-Peter Kaul disagreed  
10 with the concept that an organization that lacked  
11 certain statelike attributes could suffice under the  
12 statute.

13           The prosecution is taking the position  
14 that it says "state or organizational policy," so you  
15 start with the language of the statute, which  
16 distinguishes between something that is state or  
17 state-centered and something that is not  
18 state-centered.

19           And looking at that, looking at the  
20 relatively limited drafting history and the views of,  
21 you know, various commentators and experts who write  
22 about the statute and explain what they think the  
23 statute means, our position has been that an entity  
24 that has the power and the capacity to -- in an  
25

1 organization, network, or however you define it,  
2 create the situation and have the -- the  
3 organizational capacity to commit these crimes  
4 suffices under the statute.

5 But one of the issues is going to be  
6 how much of this is jurisdictional, how much of it is  
7 statutory interpretation in terms of the elements of  
8 the crime, and how much of it is actually sort of  
9 proof of the elements at the trial.

10 So I'm not really sure exactly what  
11 the Appeals chamber is going to do with this in terms  
12 of -- well, of course, we're never sure what the  
13 Appeals chamber is going to do with anything, but  
14 what they are going to do with this in terms of  
15 the -- considering the issues on the merits on this.

16 But, you know, I also come from -- and  
17 part of it is my bias. I come from a background  
18 where we have sort of enterprise crimes and  
19 organizational crimes that are not necessarily  
20 state-oriented, and I'm familiar with, and the other  
21 people in the office, including the prosecutor, are  
22 familiar with this concept of the ability to go after  
23 an organization that has the capacity, has the  
24 network, has the organ -- has the hierarchy and the

25

1 ability to enforce and the ability to carry out acts  
2 that replicate a state power, but are not -- not  
3 state-centered, and that the statute need not be read  
4 on its face to limit it to state action, that  
5 organizations that don't have the state structure,  
6 but, nonetheless, have the capacity to be dangerous  
7 and to commit these kinds of crimes ought to be  
8 covered.

9                   It is in our view a statutory  
10 interpretation question, and I'm not sure that I can  
11 really get into the pros and cons of it other than to  
12 say that's what it's really about.

13                   MR. SCHEFFER: Thanks, Sara, and I -- I didn't  
14 mean to mislead there. Most of that was a 2010  
15 phenomenon, the network discussion, but it has  
16 slipped into 2011. I should have clarified that.

17                   But can I just ask you one additional  
18 follow-up on Kenya, which is we had a lot of  
19 discussion in Kenya about the course of  
20 complementarity with the Kenyan government.

21                   Can you bring us up to date of what  
22 happened during 2011 on the issue of Kenya being able  
23 to take some control over these cases and yet being,  
24 you know -- well, where the court's obviously

25

1       responded otherwise to that intent by the Kenyan  
2       government?

3               MS. CRISCITELLI:  There was no action, and the  
4       prosecution sort of brought its investigation,  
5       brought its case, and then the Kenyan government  
6       said, "You know what?  We're prepared to look into  
7       this, but our process is going to be slow."

8               So they changed -- I think they may  
9       have changed their constitution, then they changed  
10      their statutes, then they created a mechanism for  
11      purposes of investigation, and they came forward to  
12      the court and they said, "We have all of this in the  
13      works.  See?  Here's our new statute.  Honor our  
14      intent, delay this, give us the opportunity."

15              And what the court said was the  
16      admissibility is -- and the complementarity issue,  
17      whether there is a genuine proceeding on the ground  
18      looks at this moment in time, and right now, you  
19      haven't shown us anything.  You have stated an  
20      intent, you have produced your laws, but we don't  
21      actually see any movement.  So right now, when we  
22      assess the -- the jurisdiction of this court on  
23      admissibility, we don't see any ongoing proceedings.  
24      So that's the status of it for purposes of the

25

1 admissibility.

2 I don't think it -- I mean, I think  
3 the state has the ability -- and I should read the  
4 statute again -- to bring a new admissibility  
5 challenge once it gets moving and once it does  
6 something. But the current status of this case is an  
7 expressed intent by Kenya to take charge of its own  
8 case, but not a lot of activity.

9 And in the absence of anything that  
10 can be pointed to, the chamber and the Appeals  
11 chamber on the Kenyan government's appeal has said,  
12 "There's no activity, there's no ongoing case, and,  
13 therefore, it remains admissible in the ICC."

14 MR. SCHEFFER: And I suspect that -- and,  
15 Caroline, I want to bring you in on this, but I  
16 suspect, of course, the judges of the ICC would have  
17 the opportunity at any time under Article 19(1) to  
18 raise the admissibility issue themselves again if  
19 they saw something going on in Kenya that would give  
20 them cause to do so, but they presumably have not  
21 seen that kind of activity.

22 I also note, Diane, that the African  
23 Union weighed in again on Kenya's issue as a point of  
24 contention with the ICC during 2011, but it was

25

1 perhaps simply a political statement by the African  
2 Union to defer to the judgment of the Kenyan  
3 government.

4 MS. AMANN: That's right. And I think we  
5 should add that within Kenya, the case, as I said, is  
6 very salient. If you Google "International Criminal  
7 Court" on any given day, as I tend to do most days,  
8 almost always you will have a couple of Kenyan  
9 front-page stories. There's, like, a dedicated beat  
10 for the ICC from all different parties, and I would  
11 think it would be quite interesting to do some public  
12 opinion polling of just how deep into the populous  
13 the awareness goes. I think it's quite -- very much  
14 so.

15 There's also presidential elections.  
16 The case has dragged on long enough now that we have  
17 a new round of elections coming up, and one of the  
18 big controversies is two of the people who remain  
19 under indictment were presidential candidates, or  
20 president and vice president, and there have been  
21 issues about whether they're going to be permitted to  
22 go forward. So there is a lot of ferment within the  
23 domestic system in many different ways.

24 The Kenyan constitution that was  
25

1 adopted, as I understand it, on paper may be the most  
2 progressive pro human -- it may trump South Africa  
3 now on its commitment to human rights, but, of course  
4 there is a time lag between positive legal imple --  
5 action and actual implementation. So it will be  
6 interesting to see if Kenya does evolve in a way to  
7 become the first state to succeed by its actions in  
8 an admissibility challenge based on complementarity.

9           And I think you're right, that the  
10 statute leaves that just as jurisdiction as a  
11 constant throughout the entire life of the case.  
12 This may be at issue as well, at least until the  
13 people are in the dock and the trial proceedings  
14 commence.

15           MR. SCHEFFER: Precisely, because then the  
16 game changes with admissibility.

17           Caroline, did you want to jump in with  
18 either some comments on that or perhaps a couple of  
19 other issues that have percolated at the table here  
20 as our representative from the defense counsel?

21           MS. BUISMAN: Well, I'll start with Kenya  
22 because I was quite involved in that. I think the  
23 point of the elections that are upcoming is quite an  
24 interesting one, because, indeed, there's two  
25

1 potential candidates who are now facing -- who are  
2 now facing charges that are confirmed by the ICC, and  
3 this is also an issue when we talk about  
4 admissibility.

5 I mean, we have the Appeals chamber's  
6 decision, and it's very clear what -- and others know  
7 it is an agreement on what they've decided, and they  
8 have indeed decided that it has to be these  
9 particular cases.

10 I do think -- there is, of course, a  
11 dissenting opinion who sort of sees it a little more  
12 widely and who wants to have a little more  
13 flexibility for states even if there's a real  
14 potential that they would actually carry it out in  
15 the future.

16 But you have the situation now where  
17 the ICC steps in and it technically -- well, we don't  
18 know what they are going to decide, but you do  
19 actually also intervene in a Democratic elec --  
20 procedure, so now we have two candidates who are  
21 standing accused, and, I mean, there is a question.

22 If Kenya, for instance -- it's not  
23 that there's been no actions. They have actually  
24 tried many people for post-violence -- post-election  
25



1 violence, so it's not that there's only these six  
2 suspects. So that's, of course, the question:  
3 Whether or not we should have this view on  
4 admissibility, that it's for the ICC to decide who  
5 they should prosecute. Maybe they want to prosecute  
6 someone else.

7           Of course, there was a case opened and  
8 this is something that the dissenting opinion also  
9 refers to, but, I mean, this is an Appeals chamber's  
10 decision that's already decided.

11           On -- on the issue of organization,  
12 well, it's pending, so I also don't want to go too  
13 far, but I do think that the two points are Kaul  
14 looks at it from a structure point of view. You look  
15 at -- okay, he goes -- indeed, he thinks there needs  
16 to be state elements, but he looks at the structure,  
17 whereas if you look at the majority decision, it's  
18 more what can they -- it's victim-oriented.

19           Well, the defense takes the view that  
20 it should be more looking at the structure because  
21 there's been -- the drafters of the ICC statute meant  
22 to -- they discussed, for instance, crimes like  
23 terrorism and Mafia sort of crimes, and we take the  
24 view that they didn't want it; they meant to exclude  
25

1 those.

2                   So I think it's a step in -- yeah, it  
3 can be said, as Kaul has said, that this is in  
4 violation of state sovereignty, but we will see what  
5 the Appeals chamber decides.

6                   I think on the issue of  
7 complementarity, we have heard that -- I mean,  
8 apparently because there was a bit of a  
9 misunderstanding perhaps of the position of the  
10 prosecution on Libya, because there was a bit of an  
11 understanding (sic) that the prosecution actually  
12 took the view that this should be for Libya, but  
13 we've heard that it's a bit more complicated.

14                   So the only thing I would like to say,  
15 if you compare Kenya and Libya, I think that Libya  
16 also -- like, at this moment, I think we agree there  
17 isn't actually a very fully operational system yet,  
18 so that would also be for future reference, so I  
19 don't see much of a difference between Libya and  
20 Kenya.

21                   So that was on Kenya. I don't know if  
22 I can comment more or shall I leave it for others?

23                   MR. SCHEFFER: Well, why don't you hold on for  
24 a moment, because I'd like to ask Iain Morley, if I

25

1 might: There was, I think, some activity with your  
2 court in 2011 on the issue of victim participation,  
3 which is actually of great interest to many of us  
4 because obviously it's so central now to ICC and to  
5 ECCC work, and I know the role of victim  
6 participation was dealt with in certain proceedings  
7 before the Special Tribunal for Lebanon in 2011.

8           And I'm just wondering if you could  
9 explain it in the context of Lebanon and how  
10 important it is for the people of Lebanon that there  
11 is victim participation in the Special Tribunal for  
12 Lebanon.

13           MR. MORLEY: Victim participation has become a  
14 growing issue, I think, in the tribunals. We see it  
15 in the Cambodia Court; I know Andrew may have some  
16 thoughts. We see it also in the ICC; I imagine that  
17 those from the ICC may have some thoughts.

18           And the Special Tribunal for Lebanon,  
19 because it applies domestic Lebanese law, which is  
20 rooted in largely French civil law, which has victim  
21 participation elements naturally within it,  
22 consequently here at the Special Tribunal for  
23 Lebanon, there are victim participation issues which  
24 arise from our application of domestic Lebanese law.

25

1                   So it's a feature that we're  
2     developing. There is an office which is designed to  
3     deal exclusively with it. It's run by a splendid  
4     chap, Alain Grellet, and the extent to which it's of  
5     interest to the Lebanese is probably reflected in how  
6     much Twitter traffic there has been.

7                   You may be aware that the STL has had  
8     the perhaps adventurous idea of going on Twitter. It  
9     started with Herman, and that's the Registrar, Herman  
10    von Hebel; it then moved swiftly to Francois,  
11    Francois Roux, Head of Defense; and I think yesterday  
12    Alain Grellet was Tweeting throughout Lebanon.

13                  People are quite interested in what  
14    we're doing here. There's been quite a lot of  
15    grass-roots response to the work that's taking place  
16    here, and if any of you read around your breakfast  
17    tables the Lebanese press -- I imagine you do little  
18    else; certainly we do little else here -- there's a  
19    lot of Lebanese press interest in what we're doing  
20    which goes beyond simply the event, the assassination  
21    of Hariri, but it also goes to political  
22    ramifications and issues as to how the victims are  
23    being dealt with, and outreach is a big issue.

24                  So is it important? Yes, it is very  
25

1 important. There's a tradition of victim  
2 participation in Lebanese domestic law, and the  
3 events that we're dealing with are very big, had a  
4 huge impact on the country, a lot of people were  
5 heard, and a lot of people take an interest, as  
6 exemplified by Twitter and the incessant fascination  
7 for this place through the press.

8           Where we are at with regard to victim  
9 participation is at a nascent stage. Recently there  
10 has been the filing of applications to be considered  
11 as victims, and we don't know yet what the outcome of  
12 that is, and also there has been some rule changes,  
13 if I remember rightly -- perhaps I'll be corrected by  
14 Judge Ray, who is sitting in court -- or at least  
15 sitting here.

16           There's been, I think, a rule change  
17 with regard to an aspect of victim participation and  
18 whether a person can be a victim and also a witness  
19 within the proceedings, or at least the ease with  
20 which that can happen. So we're very alive to victim  
21 participation issues.

22           And we anticipate in time in the  
23 courtroom there will be victim participation teams of  
24 lawyers. We don't know how many, but we anticipate  
25

1 at least two to represent their interests once they  
2 have been identified as to who they are.

3 And if you've all been in the splendid  
4 courtroom, which isn't very far from where we're  
5 sitting now, you'll discover that there are a lot of  
6 chairs in the room. There are chairs obviously for  
7 the prosecution; there are a few prosecutors lurking  
8 in the building.

9 There are more chairs for defense  
10 counsel, and then within the same side of the  
11 courtroom as where the prosecution sits, there is a  
12 whole section devoted to the teams who will be  
13 working on behalf of the victims.

14 How the participation of victims'  
15 counsel will work, we don't know. It's all new. As  
16 you know, we haven't yet started a trial proceeding  
17 where we are receiving evidence and filing arguments  
18 about the evidence, but we do anticipate there will  
19 be a three-way presence in the courtroom: There will  
20 be prosecutors, there will be defense counsel, and  
21 there will be victims' counsel as well.

22 And, additionally, we should mention  
23 that there is a fourth presence in the form of the  
24 judges. Under our rules, it is available to the  
25

1 judges to take a very active role in controlling the  
2 proceedings, more so than under the usual adversarial  
3 process where the judges are more like referees and  
4 they just see counsel fight it out amongst  
5 themselves. There is the available power to the  
6 judges to take a very active role themselves.

7                   So we expect victims participating in  
8 the courtroom to be effective and noticeable, and  
9 they will influence the dynamic of what it is that  
10 happens. I hope that helps.

11                   MR. SCHEFFER: Iain, it does help very much,  
12 and I really need to bring in Andrew at this moment  
13 because victim participation is a critical feature of  
14 the Extraordinary Chambers in Cambodia. There was an  
15 enormous amount of activity on this issue during 2011  
16 with both Trial Number 2 and also the fallout from  
17 Trial Number 1, frankly, as well as anticipations  
18 about investigations in 3 and 4.

19                   Andrew, was there anything in the  
20 evolution of all those developments on victim  
21 participation in Cambodia that struck you as  
22 particularly novel or significant to suggest today?

23                   MR. CAYLEY: I mean, I think sort of talking  
24 in broader terms, at least the evolution that I've

25

1 seen take place at the court in respect of civil  
2 parties and victims, the biggest problem is actually  
3 not the law, the law is pretty straightforward. It's  
4 the modalities of how they actually participate in  
5 the proceedings. And what I mean by that is this  
6 argument that we've heard quite a lot from defense  
7 lawyers in Case 2 that they are a second arm of the  
8 prosecution.

9                   And certainly that is something -- I  
10 mean obviously different parties have different views  
11 on that issue, and I think they certainly bring  
12 something to the proceedings that the actual  
13 Tribunals never had. And certainly if you look at  
14 the evolution from the early '90s where it was based  
15 principally on a system of retribution, much like the  
16 Nuremberg trials where you were simply interested in  
17 trying and punishing the perpetrators, I think in  
18 Cambodia what has been demonstrated is that you can  
19 actually have a restorative system of justice, too,  
20 where victims really feel a degree of ownership in  
21 the proceedings, and I think it's actually encouraged  
22 public involvement in the process, too.

23                   Because victims are in the courtroom  
24 and participating in the process, it's encouraged a

25



1 lot of members of the public to come who would not  
2 have otherwise come. I think one of the problems  
3 that was identified in the first case, and certainly  
4 something that Iain's already mentioned they're going  
5 to be confronting here, is the management of victims  
6 in civil parties.

7 In the first case, I wouldn't say it  
8 was a free-for-all, but certainly everybody wants to  
9 speak, and it led to elongated proceedings where you  
10 had multiple civil parties often making the same  
11 point and taking up a lot of court time, which is why  
12 they evolved to this system in the second case of a  
13 co-lead lawyer, where there would be a nat -- in the  
14 system in which we work in the Cambodian courts,  
15 because there's an international lawyer and then a  
16 national counterpart.

17 Now there are co-lead lawyers who  
18 essentially manage the submissions of all of the  
19 civil parties and do most of the examination of the  
20 witnesses in order to prevent duplication.

21 But, you know, a general concluding  
22 remark, you know, coming in to work in a civil law  
23 system as a common-law lawyer, I do think it has its  
24 value.

25

1                   And the end of the appeal of the first  
2 case there was a lady from Paris, a Khmer, French  
3 Khmai, so she had had essentially fled from Cambodia  
4 in 1975 and had had to leave three-quarters of her  
5 family behind, including her sister, her eldest  
6 sister, and all of her children. They all perished  
7 in S-21, and, you know, she's a very well-educated  
8 lady professor from Paris, and she's come back, you  
9 know, 30 years later to try to see some kind of  
10 justice for her sister.

11                   And, I think -- you know, she came up  
12 to me afterwards at the end of the appeal and said,  
13 "Well, you know, it's 30 years on, but I actually do  
14 feel, you know, one, that I took part in the process,  
15 I really was here for all of it, I had a lawyer  
16 representing my interest, I was able to speak to the  
17 court, I feel I can now actually put this behind me."

18                   So for all of the challenges of the  
19 civil party victim system, you know, having many,  
20 many people in the courtrooms, you know, other than  
21 the normal parties that we were used to in the ad hoc  
22 tribunals, there is an enormous benefit to it, and I  
23 think it addresses many of the criticisms of the  
24 ICTY, for example, where victims were essentially  
25

1 instruments of the prosecution and nothing else.

2 MR. SCHEFFER: Thank you, Andrew, very much.  
3 I'd like to jump now to Fidelma for a few moments and  
4 then back to Mark Harmon, and then I want to open it  
5 up for some questions.

6 Fidelma, with the Special Court for  
7 Sierra Leone, we -- in last year's conference we had  
8 a long discussion about the International Residual  
9 Mechanism, so we've sort of covered the conceptual  
10 issue of that coming on deck under the leadership of  
11 Hassan Jallow and Judge Meron.

12 I would like to ask about the  
13 completion strategy for the Special Court for Sierra  
14 Leone. Could you give us a sense of what is the  
15 future of this court once we have the trial judgment  
16 on Charles Taylor? We have to anticipate an appeals  
17 stage. What is the completion strategy for the  
18 Special Court for Sierra Leone?

19 MR. VIDEOGRAPHER: There's a tape change, if  
20 you can hold that thought.

21 MR. SCHEFFER: Oh, okay.

22 (WHEREUPON, Disk 4 ended.)

23 Fidelma?

24 MS. DONLON: Thank you. With reference to the  
25

1 completion strategy of the Special Court for Sierra  
2 Leone, basically it's composed of timelines for  
3 completion of our work set against various  
4 milestones. So as mentioned by David, a critical  
5 milestone will be reached on the 26th of April with  
6 the rendering of the judgment in the Charles Taylor  
7 case.

8           The outcome of the judgment will  
9 determine the procedural steps that will happen in  
10 that particular case afterwards, depending on whether  
11 there's a judgment of innocence or guilty on some of  
12 the counts.

13           For the Special Court for Sierra  
14 Leone, if applicable, if there is a sentencing,  
15 sentencing judgment is estimated to be six to eight  
16 weeks after the judgment is rendered, and  
17 subsequently it's anticipated that there will be an  
18 appeals phase.

19           The judges of the Appeals chamber,  
20 based on their appeal work in the three other cases  
21 that were before the court, have estimated a  
22 six-month period for the appeals process, but they  
23 qualify that. Obviously there may be motions that  
24 they have to deal with and other issues that will

25

1 arise, so it may be longer.

2           So in terms of the timelines for our  
3 completion, previously we were working towards a July  
4 2012 timeline, which at this point in time we know is  
5 not a reality, but at the end of May, we have a  
6 plenary of the special court, at which point in time  
7 the current timelines for completion will be revised.

8           In terms of process and what's  
9 happening, really we have three predominant areas of  
10 work. Obviously our priority is the proceedings  
11 against Mr. Taylor, and then subsequently, as I  
12 mentioned this morning, we do have some contempt  
13 proceedings that will be going to trial after  
14 judgment in that particular case.

15           But at the same time, we are managing  
16 the process of closure and transition to our residual  
17 mechanism. I think unlike ICTY and ICTR, we don't  
18 have an in-built period of transition.

19           Effectively what has been agreed by  
20 the governments of Sierra Leone and the United  
21 Nations is that there will be a residual mechanism  
22 with effectively a small office in The Hague and a  
23 small office in Freetown to manage the ongoing  
24 residual functions, which are basically the same as  
25

1 the residual functions that have been defined for the  
2 ad hoc tribunals.

3           So upon completion of the proceedings  
4 in the Taylor trial, it's expected that within a very  
5 short period of time, the court will actually  
6 transition to the residual mechanism, because at the  
7 moment, in advance of that date, what we are doing is  
8 working towards its establishment. And, as I  
9 mentioned, the international residual mechanism for  
10 criminal tribunals, that's been created by Security  
11 Council resolution.

12           The government of Sierra Leone and the  
13 United Nations have -- similar to the constituent  
14 documents of the special court, they have agreed on  
15 the structure and the mandate of the Residual Special  
16 Court by signing effectively a bilateral treaty. So  
17 on the basis of that, we together -- across the  
18 tribunal, together with our host states in the  
19 Netherlands and Sierra Leone and the management  
20 committee are working on a vast array of projects,  
21 preparing for our transition to the mechanism.

22           MR. SCHEFFER: And, Fidelma, just a short  
23 question. I think a lot of people always wonder why  
24 it takes so long for a trial judgment to be  
25

1 delivered.

2                   What is the basic explanation on the  
3 long period that has transpired in awaiting the trial  
4 judgment on the Charles Taylor case?

5           MS. DONLON: I mean, I think it's a general  
6 comment, although a lot of people do question why  
7 does it take so long to render judgments in  
8 international trials. I think at the same time, and,  
9 I think, perhaps some of the other panelists this  
10 morning have indicated, that there may not be  
11 cognizance of the difficulty that's faced by  
12 institutions in terms of dealing with these cases and  
13 complexity of them.

14                   So, for example, in -- in the Taylor  
15 case, I understand that there's over 50,000 pages of  
16 transcripts and 1,500 to 2,000 exhibits that the  
17 judges themselves have to read through. So it's a  
18 complex case and it needs the time that is  
19 appropriate for the judgment to be rendered.

20           MR. SCHEFFER: Okay. And I thought I'd ask  
21 one question of Mark Harmon and then we would open it  
22 up for general questions.

23                   Mark, could you give us an update as  
24 to what transpired during 2011 and the last couple of  
25

1 months on two cases, the Karadzic case and the Seselj  
2 case. These have been ongoing now for a number of  
3 years, and I think we need to have just a substantive  
4 update on the course of these trials.

5 MR. HARMON: The Karadzic case, as I  
6 understand, is still -- the prosecution is still  
7 submitting in evidence its case-in-chief. It will  
8 conclude fairly shortly. The majority, a significant  
9 amount of that evidence has been submitted in written  
10 form, which is permitted under the rules, so witness  
11 statements, old transcripts, can be submitted in lieu  
12 of oral testimony.

13 Karadzic is self-represented. He is  
14 conducting his self-defense -- or his defense in a  
15 way that is appropriate, I would say, in general  
16 terms. He is supported by a large team of lawyers  
17 and support staff, so when one conceptualizes  
18 self-representation, one has to bear in mind that  
19 Mr. Karadzic has a very robust team behind him. A  
20 legal expert lawyer sits in the courtroom with him,  
21 makes objections, and assists him. But that case is  
22 going fairly well.

23 The Seselj case is a contrast, to put  
24 it mildly, and one has to be very circumspect in  
25



1 this. He is also self-represented. The prosecution  
2 finished its closing arguments last week, Seselj was  
3 supposed to start his closing arguments this week. I  
4 saw on the web site that he is ill and they've been  
5 postponed. I don't know more than that, but we  
6 should soon see the end of that case.

7           As an issue of self-representation, he  
8 squarely brings into the issue of whether or not  
9 self-representation is appropriate in these cases.  
10 There's a long history which I won't comment on but  
11 should be looked at if people want to study the issue  
12 of self-representation.

13           In brief, he went on a hunger strike  
14 when counsel was to be imposed on him. In the  
15 backdrop of that was that Mr. Milosevic had died in  
16 prison. He was permitted then to represent himself;  
17 he went off his hunger strike.

18           He has been a vexatious litigant, to  
19 put it mildly. He is disrespectful of the parties,  
20 he's dis -- contemptuous of the witnesses. He has  
21 been prosecuted twice for revealing the identities of  
22 protected witnesses in books. He's disrespectful to  
23 the judges. If I conducted myself in the manner he  
24 conducts himself in the courtroom, I would be denied  
25

1 a right of audience, very frankly. That's my view.  
2 Nevertheless, the case will be coming to an end very  
3 shortly, and that's what I can tell you about the  
4 cases.

5 MR. SCHEFFER: Caroline, can you just jump in  
6 from defense counsel's point of view -- I mean,  
7 defense consultant's point of view? What is the  
8 general view in the defense bar about  
9 self-representation? I mean, just the honest view of  
10 it.

11 MS. BUISMAN: Well, I think -- in general, I  
12 think that the defense is in favor of it, and I just  
13 wanted to make one point on Karadzic, because I think  
14 that works actually really well. I just think it's  
15 almost like a waste of time that there's this team  
16 that's being employed there and it has no function.

17 At this moment, I think there is no  
18 greater risk that Karadzic is not going to cooperate  
19 in the future than anyone else. He's really shown to  
20 be cooperative. So at this moment, yes, he has his  
21 advisors, which is, I think, all very good. I think  
22 maybe that's the best in-between solution if you have  
23 a self-representative client, that there's advisors  
24 on the background. But I think this team, this --

25

1 this second team that's being put in place just in  
2 case he will stop cooperating, that, I don't know how  
3 much money that's costing. All I don't know, at some  
4 point, that may have to be reconsidered.

5 MR. SCHEFFER: Okay. I would like to open it  
6 up for some questions from the audience and then  
7 we'll go back to our round table. We have about an  
8 hour and ten minutes left in the conference, so I do  
9 want to give some opportunity for questions from the  
10 audience. Anyone? Yes, over here (indicating).

11 Phil, if you could bring the mic to  
12 him.

13 MR. SIVERSEN: Thanks. Jim Siversen from the  
14 University of Leiden. I just wanted to ask about the  
15 continuing function of Article 98 of the Rome Statute  
16 after the recent decisions essentially reprimanding  
17 Malawi and Chad for noncooperation. There's been  
18 certainly rhetoric saying the Pre-Trial chamber, the  
19 first Pre-Trial chamber, has written Article 98 out  
20 of the statute. Statements to that effect have been  
21 put forth by the African Union, and I don't know how  
22 literally to take that, particularly given the wide  
23 varieties of immunities protected by Article 98,  
24 including immunities covered by agreement, immunities

25

1 covering property, immunities covering diplomatic  
2 immunities as opposed to state immunities, perhaps  
3 other state immunities aside from head of state  
4 immunity, so just an open question as to the  
5 continuing function of Article 98 given the Pre-Trial  
6 chamber's recent decisions.

7 MR. SCHEFFER: Sara, you want to tackle that?

8 MS. CRISCITELLI: Not particularly, but --

9 (WHEREUPON, there was laughter.)

10 Well, let me just so state I come from  
11 a non-State Party that has embraced Article 98 rather  
12 enthusiastically as a way of avoiding. I -- I  
13 think -- I don't know the answer to what you do  
14 about, you know, these referrals. My gut feeling,  
15 and it is mine; it is not the OTP, et cetera, et  
16 cetera, is he who has the body has the power, and the  
17 statute does not protect head of state immunity, but  
18 it will require some sort of enforcement mechanism  
19 which the court does not have and certainly which the  
20 prosecutor doesn't have, to persuade states to  
21 surrender persons that the state does not -- the  
22 states do not wish to surrender.

23 So the reality is we have a statute,  
24 but it will require something. You know, I look  
25

1 at -- it's obviously not ICC, but the efforts that it  
2 took over -- I can't even remember -- a decade or  
3 more to bring the Lockerbie, the Pan Am 103, persons  
4 to justice, and that was done through international  
5 action, UN sanctions, and the rest. So, you know,  
6 we'll see how it works out.

7 But I don't think that -- and it  
8 depends on the will of the United Nations  
9 essentially, because they can send all of these  
10 referrals and we can send all of our letters to the  
11 UN, and we can report all of these states that won't  
12 do anything, and that's really the limit of the  
13 court's power, and the court's power is more than the  
14 OTP's power. So, you know, it is what it is, and it  
15 will all kind of shake out, but I don't have a better  
16 answer than that.

17 MR. SCHEFFER: Diane may have a better answer,  
18 Sara.

19 Diane, what's your answer?

20 MS. AMANN: No. I actually have a question.  
21 If I'm not mistaken, what these are is referrals in  
22 which the OTP is informing the Security Council that  
23 countries like Chad have given safe passage to people  
24 like Bashir; is that correct?

25

1 MS. CRISCITELLI: I think we inform the  
2 Chamber and then the Chamber informs the Security  
3 Council.

4 MS. AMANN: But there -- okay. So the ICC is  
5 making that information --

6 MS. CRISCITELLI: Right.

7 MS. AMANN: -- known to the Security Council.  
8 Is that only happening with regard to the Security  
9 Council referral cases, because the curious thing to  
10 me is --

11 MS. CRISCITELLI: Yes.

12 MS. AMANN: Okay. What would happen if this  
13 were to occur in a non-Security Council case? Is  
14 there not -- given that the -- the alleged offenders  
15 are States Parties to the statute, is there not  
16 recourse --

17 MS. CRISCITELLI: Well, it's to the ASP, to  
18 the States Parties themselves.

19 MS. AMANN: So it's going to the ASP and not  
20 to the Security Council.

21 MS. CRISCITELLI: That's correct.

22 MS. AMANN: Okay. All right. But there is --  
23 I do not believe, from my reading of the statute,  
24 there's any mechanism within the ASP to really  
25

1 actually do anything with these referrals.

2 MS. CRISCITELLI: Well, I mean, they can take  
3 whatever diplomatic action is within their power.

4 MS. AMANN: But they're not required --

5 MS. CRISCITELLI: They can shun each other.

6 MS. AMANN: They have the --

7 MS. CRISCITELLI: I don't know.

8 (WHEREUPON, there was laughter.)

9 MS. AMANN: They have the discretion to shun  
10 each other, but --

11 MS. CRISCITELLI: Right.

12 MS. AMANN: But it -- again, if we're looking  
13 at lacunae in the statute, you know, there's an order  
14 for cooperation, but there never were any teeth added  
15 into it, and now we're seeing the difficulties of  
16 that.

17 MS. CRISCITELLI: Yeah. You know, maybe in  
18 the next review conference they'll give us an Army.  
19 You know, I don't know what to --

20 (WHEREUPON, there was laughter.)

21 But that's where we are.

22 MS. AMANN: But they could do things for --

23 MS. CRISCITELLI: Do not quote me on that.

24 MS. AMANN: But I guess what I'm thinking of,

25

1 it would be open to the ASP, for instance, to bar  
2 States Parties from voting --

3 MS. CRISCITELLI: Yeah.

4 MS. AMANN: -- in ASP proceedings. So  
5 sometimes we need to think more creatively if there  
6 are problems. Rather than say, "What we really need  
7 is a police force," there are ways that the very  
8 governing body of the ICC could police itself if it  
9 wished to do so.

10 MS. CRISCITELLI: It's conceivable. That's a  
11 political question, and political will is always a  
12 tricky thing to predict and to enforce, you know?

13 If I were stayed, will I care that  
14 much if I don't have to vote or I'm not allowed to  
15 vote for a year? You know, I don't know how you --  
16 just the reality of life is I don't know that there's  
17 much you can do other than try to exert political  
18 pressure in whatever mechanism is available. YouTube  
19 would -- could possib -- seriously. You know, that  
20 kind of public attention might be as effective as  
21 anything else.

22 MR. SCHEFFER: Thank you very much. I just  
23 want to add a couple of words on this. On the issue  
24 of some physical capacity on the part of the court, I

25



1 did publish on the ICC/UCLA law web site in September  
2 a proposal to that effect; namely, a protocol that  
3 would enable the ICC to have a more realistic  
4 capability with the consent of the subject state to  
5 actually bring the kind of assets on -- to bear on  
6 actually apprehending indicted fugitives who may be  
7 on that state's territory. So I just direct you to  
8 that article.

9                   But the second thing to the  
10 professor's question from Leiden -- and this will not  
11 be of any surprise to you, I just want to put this  
12 out on the table.

13                   It does reveal your question, the  
14 continuing weakness that Sara also pointed out, and,  
15 I think, Diane, about political will, that the  
16 Security Council certainly has it within its capacity  
17 to say to -- in fact, it could make it very  
18 particular. It could say, "With respect to States  
19 Parties to the Rome Statute and in connection with  
20 this referral to the ICC, any arrest warrant that is  
21 issued by the ICC in connection with this referral  
22 shall be complied with by any State Party to the  
23 court regardless of any claimed immunity defense by  
24 the individual leader."

25

1                   Now, that kind of specific wording is  
2 within the power of the Security Council to put in  
3 the resolution. There's nothing preventing it from  
4 doing so. And, of course, it could be even broader  
5 than that. It could say, "Any non-States Party must  
6 comply with such an arrest warrant." But, I mean, at  
7 a minimum, any State Parties should.

8                   It just reflects that there's still a  
9 gap between the right of referral of the Security  
10 Council to the ICC and the further responsibility to  
11 assist the ICC to enforce its mandate with respect to  
12 that referral that the Security Council has very  
13 unfortunately failed to step up to the plate to do at  
14 all. And Libya is a classic example, as is Sudan, so  
15 just to put that on deck. I think you can get to the  
16 immunity issue, but it does require political will  
17 within the Security Council.

18                   Oh, I'm sorry. Let's go for another  
19 question over here (indicating).

20                   MS. SHEROD: Hi. Thank you. I'm Laurel  
21 Sherod; I'm currently working with the OTP in the  
22 Jurisdiction, Complementarity and Cooperation section  
23 at the ICC.

24                   My question is partly prompted by the  
25

1 review of litigation issues in 2011, and I feel like  
2 something that hasn't been brought up to the surface,  
3 but has been alluded to by a number of the speakers,  
4 is budgetary issues. And I wonder particularly  
5 perhaps from the defense perspective whether there  
6 may be more flexibility in your own defense when  
7 you're raising these issues, to bring that further up  
8 to the surface of the argumentation in terms of what  
9 effect resource constraints may be having both on the  
10 conduct of the investigations and the prosecution on  
11 behalf of the OTP, as well as potentially -- you  
12 know, I realize there have been significant cuts to  
13 the legal aid budget for defense and as well the  
14 completion strategies.

15 This is obviously all having some  
16 incursion with budgets, and I just feel like it's  
17 something that's there and is obviously ever present,  
18 but doesn't really feature in public discourse.

19 I do know that our prosecutor did  
20 actually make reference to budgetary constraints once  
21 over the past year in a public forum, but it doesn't  
22 seem to come up very often.

23 So I wonder if looking ahead, this may  
24 be something that is raised perhaps -- perhaps more  
25

1 by the defense, or perhaps it may even become an  
2 issue that the prosecution has to address straight on  
3 in light of the budgetary issues that are affecting  
4 at least the ICC and also with respect to the  
5 completion strategies.

6 MR. SCHEFFER: Let's see. Hassan, do you want  
7 to take that on in terms of the international  
8 residual mechanism issue and the funding of it? And  
9 then maybe Sara might want to have something to say  
10 about the ICC issue on this.

11 MR. JALLOW: Well, briefly, with regard to the  
12 firstly ad hoc tribunals, I think New York has been  
13 quite sympathetic where we've been able to identify  
14 and justify the need. We have money to secure the  
15 necessary resources and we're able to carry out our  
16 activities. But clearly there is a lot of impatience  
17 there with our continued existence, and I think the  
18 general view there is that it is time the tribunals  
19 close and that any successor institution should be a  
20 very, very lean mechanism.

21 And that is why, for instance, the  
22 residual mechanism is a very, very small institution.  
23 I think the OTP combined would be about -- the two  
24 OTP branches combined will be less than 30 people or

25

1 just about that, full-time staff, and then you would  
2 recruit others as and when you need from a roster on  
3 a short-term basis, expected not to last more than a  
4 year. So we've transitioned to a very, very lean  
5 budget now for the residual mechanism.

6                   And I think this is also a reflection  
7 of the fact that the -- much of the workload would  
8 have been completed by the time the residual  
9 mechanisms come into place and that we would focus  
10 primarily on archiving, on tracking of a few  
11 remaining fugitives and any possible trials for  
12 contempt or trials of people who are fugitives who  
13 get arrested. But the work is expected to be lighter  
14 as residual, and I think this accounts for the very,  
15 very lean nature of the mechanism itself.

16                   But where we've been able to identify  
17 the need and really justify it, I think New York has  
18 been quite sympathetic. I'm not sure that's been the  
19 case with the Special Court for Sierra Leone.

20                   When I used to be there, I was telling  
21 her (indicating) that everybody seemed to be  
22 constantly running around with hats begging for  
23 funds, because it was based on budget -- a voluntary  
24 contribution budgeting, unlike the ad hoc tribunals,

25

1       which are based on, you know, on the United Nations  
2       Secretarial budget itself.

3               MR. SCHEFFER: Fidelma, would you like to  
4       comment on that?

5               MS. DONLON: As Prosecutor Jallow has  
6       indicated, the Special Court for Sierra Leone  
7       together with ECCC and, I believe, STL, our statute  
8       provides that we're not funded from assessed  
9       contributions, but, in fact, we're voluntary-funded  
10      courts, and it is an understatement to say its  
11      extremely difficult to continuously fund-raise and  
12      secure the donations that we require for our  
13      operations.

14              The global recession without a doubt  
15      had an impact on that, because we noticed a marked  
16      drop in not only our number of donors, but how much  
17      states could contribute to the extent that in October  
18      of 2009, we had to invoke the statutory provision  
19      that if there isn't sufficient voluntary funds in our  
20      bank accounts, that we can ask the Secretary General  
21      to apply to the General Assembly for an emergency  
22      grant, which is what we have to do.

23              Now, what I would say and what's  
24      important is that when we take steps like that,

25

1 obviously we do it against a budget, and it's a  
2 budget that's compiled in cooperation with all the  
3 parties and the organs of the tribunal, because from  
4 our perspective, what we have to represent is these  
5 are the funds that we require for our core  
6 operations.

7                   However, impact means that when we do  
8 get funds for our core operations, things, for  
9 example, our outreach program, which is heralded as  
10 one of the most successful across the various  
11 tribunals and it does do incredibly good work, that's  
12 not funded from our core budget. That's something  
13 that we have to look for additional funds to support  
14 it.

15                   Now, in terms of the residual  
16 mechanism for the special court, it's all  
17 comparative, and the structure of the mechanisms are  
18 driven by workloads. So I'm not criticizing ICTY and  
19 ICTR when they say their mechanisms are small, but  
20 what I can say is that the special court mechanism  
21 will indeed be smaller, with perhaps a permanent  
22 staffing of less than eight between two countries,  
23 who will manage the ongoing functions of the court.

24                   What I would like to highlight is that  
25

1 despite the fact that for years, I think most people  
2 who have practiced in courts that are  
3 voluntary-funded, have stated that it is not a good  
4 way to run business, and the Secretary General  
5 himself, I think, for -- in his report to the Council  
6 on the establishment of the special court,  
7 recommended that it would not be by voluntary funds;  
8 it would be some form of assessed contribution.

9           In spite of that and in spite of, I  
10 think, many comments, that we have to look towards  
11 some other mechanism to fund the tribunals that are  
12 not from assessed contributions. The Residual  
13 Special Court once again repeats the language of our  
14 statute, which is that it's going to be funded by  
15 voluntary contributions, and if the contributions  
16 don't meet the requirements, then there is the  
17 ability to once again go to the General Assembly.

18           However, I would point out that that's  
19 one of the greatest challenges facing the transition  
20 of the special court to the future, because if you  
21 look at it, when you see how difficult it is to fund  
22 a tribunal when we're actually in the middle of our  
23 cooperations, you can imagine when we transition to a  
24 residual mechanism, how difficult it will be to

25



1 support even something that's incredibly small, but  
2 it will be a difficult fundraising exercise. Thank  
3 you.

4 MR. SCHEFFER: Diane, did you want to add?

5 MS. AMANN: I just thought it might be useful  
6 to throw out some numbers to get a sense of what  
7 we're talking about, and I did look at this issue  
8 because I've been talk -- did a couple of talks at  
9 The Hague here since my time here, and this issue had  
10 arisen, and so I got curious, what are the actual  
11 numbers we're talking about. And, please, the folks  
12 from the tribunals, if I have found the wrong number  
13 on the wrong web site, please let me know.

14 But the range seems to be something  
15 around \$300 million or 230 Euros for the ICTY as an  
16 annual amount; 108 for -- 108 -- I'm going to speak  
17 in Euros now in honor where we are -- 108 Euros for  
18 the ICC, which, as many of you know, is a cut in what  
19 they requested; on down to something like 13 -- or,  
20 excuse me -- about 10 million Euros for the SC --  
21 Special Court for Sierra Leone. In total, it looks  
22 like it's a little over 600 million Euros for the  
23 entire project.

24 Now, this is one of those glasses  
25

1 half-full/half-empty kinds of issues. On the one  
2 hand, we might say, "A half a billion Euros for  
3 international criminal justice? That's outrageous."  
4 And that's typically what you'll hear: "This is too  
5 expensive, we can't support it, it's always growing."

6 All the victim participation things  
7 we've talked about, public outreach, these are all  
8 things criminal justice systems did not traditionally  
9 do that -- guess what -- costs money. Having  
10 tribunals in The Hague and assigning them to cases  
11 continents away -- guess what -- costs money. And so  
12 people, say "This is hard to support," et cetera,  
13 "how can they be asking for more?"

14 It's probably a day of the U.S.  
15 military operations, a half a billion dollars, and I  
16 don't say that facetiously. I don't think it's much  
17 more than a day. It's certainly probably not more  
18 than a week, right? I may be exaggerating a bit, but  
19 you get the idea, and I'm sure there are people that  
20 have done those calculations.

21 Justice is a lot cheaper than a lot of  
22 other global intervention mechanisms that are used.  
23 That said, there isn't a lot of money. I don't think  
24 we will see that when the ICTR and the ICTY shut

25

1 down, the funders will say, "Well, now we've got all  
2 this money freed up, let's give it to the ICC since  
3 that's going to be the successor to all of these."

4 In a logical world, that would seem  
5 exactly what you would do, is continue the resources  
6 and allocate them to the permanent institutions. I  
7 don't think we're going to see that. And, you know,  
8 of particular concern -- and I know Andrew alluded to  
9 it before breakfast -- just by way of example of how  
10 difficult this can be, on March 1st of this year,  
11 there was a donors' meeting with regard to the ECCC  
12 in which, as I understand it, about 35 million Euro  
13 were requested each year for the next two years, and  
14 the donors sat quietly and listened, and the pledges  
15 amounted to less than six million Euros that emerged  
16 out of that.

17 That's huge. That's a 40 million Euro  
18 shortfall for the annual budget out of that donors'  
19 meeting, and I think that's a very marked way to  
20 think about what you're hearing from these folks,  
21 about how the support, whether it's for states' own  
22 budgetary problems or tribunal fatigue problems or  
23 whatever, the support is not what it was very  
24 recently, and I think that that is an issue that

25

1 we're going to see play out in all kinds of ways in  
2 the next couple of years.

3 MR. SCHEFFER: Thanks --

4 MR. MORLEY: Can I --

5 MR. SCHEFFER: -- Diane.

6 MR. MORLEY: -- offer a --

7 MR. SCHEFFER: Oh.

8 MR. MORLEY: -- statistic?

9 MR. SCHEFFER: Yes, Iain, please.

10 MR. MORLEY: It's a Stephen Rapp statistic.

11 Stephen Rapp, known and loved by many of us here, is  
12 the successor to David as the War Crimes  
13 Ambassador-at-Large for the U.S., now called the  
14 Ambassador for Global Criminal Justice, I think.

15 Steven says -- and here's a statistic  
16 to have in mind -- that the tribunals thus far have  
17 cost about \$15 billion, which is less than one  
18 percent of the annual cost of conflict in the world.  
19 If you look at it in those terms, it's value for  
20 money.

21 MR. SCHEFFER: And if I might just add to  
22 that. Part of my responsibility now with Cambodia as  
23 the special expert is to actually raise this kind of  
24 money for the Cambodia court, so I live this just

25

1 about every hour of the day.

2           And it was a remark at this meeting in  
3 New York that took place a few weeks ago was actually  
4 somewhat remarkable in that we had struggled for  
5 months to ensure that the Cambodian side of the  
6 budget for the court, to pay for the Cambodian staff,  
7 et cetera, would be met, because it was not being  
8 met, and we were risking loosing the Cambodian staff  
9 of the court because they weren't being paid for  
10 months, since October 1st.

11           International donors actually came  
12 through a hundred percent for the Cambodian side of  
13 the court, and part of that is because we had  
14 adjusted what's called Overseas Development  
15 Assistance accounts for governments, whereby if you  
16 give to the Cambodia Tribunal, that is credited to  
17 your ODA contribution as a government, and that's  
18 good. We want -- you know, that's good news.

19           But it does mean that it went to the  
20 Cambodian side of the court, even though under ODA,  
21 it can go to the international side as well. On the  
22 international side, the annual budget for the  
23 Cambodian government for 2012 was \$35 million, and we  
24 raised almost \$10 million for 2012. There's been

25

1 nothing raised for 2013 yet. We are \$25 million  
2 short for 2012, and so somehow, you know, \$25 million  
3 has to be raised in the coming months to cover the  
4 expenses of that court.

5           So it's an ongoing challenge. I'm  
6 simply saying that in the book, my book that we  
7 talked a little bit about this morning, there's a  
8 series of pages in there about the budgeting for the  
9 tribunals, and I do offer some comparisons about if  
10 you look at the entire budget from 1993 through  
11 2009/2010 for the tribunals, you're really talking  
12 about the cost of one or two stealth bombers, one  
13 week's expenses of the Iraq war for the United  
14 States. It's that kind of comparison that does  
15 strike you once you look at the totality of the  
16 expenses and costs for these courts.

17           I thought I would just mention --  
18 going back, I pulled this out because I was going to  
19 read it, and then, of course, I forgot to do so.  
20 Just going one second back to the immunity issue on  
21 Sudan and President al-Bashir, I noticed in the  
22 latest report out of the Office of the Prosecutor at  
23 the ICC -- and this is dated 28 February, so it's  
24 outdated now, but it talks about where he's been

25

1 invited, where he's received invitations. One was  
2 from Iraq, to visit Iraq. I mean, our influence  
3 there, I suppose, it could be commented on -- and  
4 then he received -- this is the one that really  
5 struck me as strange and of course it's already  
6 hap -- I mean, the dates have already happened, and I  
7 don't think it was picked up.

8 Al-Bashir has also been invited by the  
9 United Nations International Telecommunication Union  
10 to attend a summit due to be held in Doha, Qatar,  
11 from 5 to 7 of March on telecommunication in the Arab  
12 world.

13 Presumably he did not accept that  
14 invitation, but just the fact that a UN entity  
15 invited him shows a little bit of a disconnect within  
16 the organization that I will be bringing up with the  
17 UN legal counsel's office. I just read this this  
18 morning, and I said, "What?" You know, "What's this  
19 all about?"

20 So why don't we -- do we have maybe  
21 one more question from the audience, and then we'll  
22 go back to our round robin? Yes. In the back there  
23 I think we have a question.

24 MS. SMITH: Thank you very much. Good  
25

1 afternoon. My name is Lorraine Smith; I'm with the  
2 International Bar Association's Office in The Hague.

3 I have a question on victims'  
4 participation. The ICC has been -- as we know, it's  
5 quite novel at the ICC, but then we've heard a lot  
6 about it as well at the ECCC and so on, but we've  
7 noticed recently in the Gbagbo case that the judges  
8 have had to acknowledge that there seems to be a  
9 problem with the applications process and how  
10 time-consuming it is.

11 And I wonder whether, you know, the  
12 panelists would be able to comment on the impact that  
13 the current applications procedure at the ICC; that  
14 is, the individual approach to victims' applications,  
15 has had, on the -- on delaying proceedings at the  
16 court, and whether, in fact, the applications  
17 procedure itself created a lot of expectations in the  
18 minds of victims as to what they would be entitled to  
19 later on in the reparation scheme.

20 And I wonder whether you would comment  
21 also on this invitation by the judge in the Gbagbo  
22 case to move from the individual applications  
23 approach to a collective applications approach and  
24 whether you think that that is feasible at all. So

25



1 that's my first question on victims' participation.

2           If I may ask another question, it has  
3 to do with another aspect of procedure, and that is  
4 the question of orality versus reliance on documents.  
5 That issue came up in the case of Jean-Pierre Bemba,  
6 and it's something that we've been discussing quite  
7 intensely, as to whether or not the ICC focuses very  
8 much on orality in terms of its procedural approach  
9 to evidence from witnesses, and whether you think  
10 that there is any possibility or likelihood that, as  
11 the cases evolve, the ICC will move away from the  
12 oral approach or the extensive reliance on witnesses  
13 to what's a greater reliance on documentary evidence.  
14 Thank you very much.

15           MR. SCHEFFER: Sara, do you want to start any  
16 of that and then we'll -- if anyone else would like  
17 to jump in.

18           MS. CRISCITELLI: Okay. Victims'  
19 participation is a huge burden on the prosecution  
20 and, I assume, an equal burden on the defense, and I  
21 know it's a burden on the court.

22           I don't have the figures offhand. We  
23 have 200-some-odd, I think, in Lubanga; they number  
24 in the thousands in Bemba. We're getting ready to  
25

1 finish our response. I think we may have one or two  
2 packages. We get them in lumps of 800 apiece.

3 I did get some figures from the Bemba  
4 team to find out how burdensome it is. It takes --  
5 according to them, it takes on average 15 minutes per  
6 application to review it, to see whether it meets the  
7 criteria, and then we do these mass filings every few  
8 weeks on the latest batch. You know, I think we're  
9 up to batch 22 on all of the victims' participation  
10 applications, which ones are right, which ones fall  
11 short on something, which ones have redactions where  
12 we can't really tell, et cetera et cetera. If that's  
13 taking us this long, I know it's taking the defense a  
14 commensurate amount of time. I don't know what the  
15 answer is.

16 We did respond on the Cote d'Ivoire  
17 proposals by the court. I think it will streamline  
18 it a bit, but I don't think it ends the problem  
19 because you're still going to have the problem of  
20 individual applications.

21 It's packaged in a easier way and  
22 there will be common -- the proposal would be the  
23 common groups, collect the applications and present  
24 them, so that may make it a little bit more

25

1 systematic and a little easier to manage, but you  
2 still have the potential flood of applications.

3           It may be that the reparations process  
4 in Lubanga will modify expectations of, you know,  
5 great restitution and great payments to victims, and  
6 if that doesn't look like it's going to work out,  
7 that may -- it may modify the flood, but it depends  
8 on why the victims participate.

9           You know, if they participate because  
10 they want to be compensated for their house that was  
11 burned down or their property that was stolen or if  
12 it were for the fact that they were raped when, you  
13 know, her husband was killed or whatever, if it's  
14 compensation, that the nonavailability of personal  
15 reparations may affect that.

16           If it is, "I'm mad, I want to be  
17 represented, I want to be part of this, I want my  
18 suffering to be acknowledged," then the victim  
19 participation is unrelated to the possibility of  
20 getting compensation, and that may continue. And  
21 it's going to be burdensome.

22           So, you know, I also -- I'm sort of  
23 alone in the OTP on this. I keep saying that right  
24 now we're a laboratory. We're just trying things

25

1 out. The statute itself is not very precise, the  
2 Rules of Procedure and Evidence leave gaps, and  
3 let's -- let's try things. You know, maybe in 30  
4 years we will have it all sorted out, but let's not  
5 be stuck with a process that the Lubanga trial  
6 adopted because it was the first one to adopt it.  
7 Let's see if we can experiment and make things work.

8           And I feel the same way about the  
9 evidence issue and the principle of orality, and I  
10 come from a system that requires in-court testimony,  
11 requires confrontation, and would exclude evidence  
12 absent that. But I'm not in that system here and  
13 maybe we have room to modify it.

14           So we have court decisions, we have no  
15 appeals firm decision on this, and let's -- let's  
16 work it out. So I'm hopeful that there will be more  
17 room for flexibility, more room to speed these things  
18 up without curtailing the rights of the defense,  
19 victim participation, orality, and all the other  
20 procedures that we have to kind of, you know, play  
21 with, experiment with, and see what works.

22           MR. SCHEFFER: Okay. Why don't we try another  
23 round robin here, if we might.

24           I would like to start, actually, with  
25

1 Mark Harmon again, because I do think we need to  
2 talk, Mark, about the -- and I won't pronounce this  
3 correctly, I usually get it wrong -- Kosovo Albanian  
4 defendant, Ha-RAJ-in-naj (phonetic)?

5 MR. HARMON: Haradinaj.

6 MR. SCHEFFER: Ha-RAJ-in-nye (phonetic).

7 Yeah. He -- there was a ruling by the tribunal  
8 regarding this particular defendant who had actually  
9 been acquitted at the Trial chamber level, and then  
10 the Appeals chamber called for a retrial of this  
11 individual regarding access to two particular  
12 witnesses, and there was a ruling whereby the court  
13 actually wanted to extend the case beyond those two  
14 additional witnesses in terms of evidence to be  
15 retrieved for the next stage.

16 I wonder if you could talk about that  
17 as well as just briefly the whole issue of  
18 provisional release under the Prlic decision, this  
19 concept of sufficiently humanitarian grounds to  
20 actually enable a defendant to have provisional  
21 release prior to trial.

22 MR. HARMON: Okay. The Haradinaj case was a  
23 case where witness intimidation was a huge issue in  
24 the case, and during the case, there were two

25

1 critical witnesses. The prosecution made major  
2 efforts to secure their attendance in court. They  
3 made applications to the court to extend time to  
4 secure their attendance. The court granted some  
5 requests for extensions, but then said, "No more."  
6 The court also concluded that the prosecution case  
7 was over because the prosecution had been given so  
8 many hours in which to present its case. Those were  
9 the two elements in -- that caused the -- that gave  
10 rise to a decision that I'm going to be talking  
11 about.

12 As a result of that, Haradinaj was  
13 acquitted. Now, that's quite alien to an American  
14 lawyer because we have a -- you know, once you're  
15 acquitted, you can't appeal an acquittal. But the  
16 prosecution appealed on the acquittal, contending  
17 that there had been essentially a miscarriage of  
18 justice, that the prosecution -- the proceedings had  
19 been undermined, they weren't fair to the  
20 prosecution, and there was a reversal on the basis of  
21 this acquittal, and the case then came back to the  
22 Trial chamber.

23 The Trial chamber denied an  
24 application by the defense to limit the partial  
25

1     retrial to the testimonies of two witnesses and two  
2     witnesses only. That's what the case -- that's what  
3     the Trial chamber decided.

4             The defense appealed that, and then  
5     the Appeals chamber considered the issue, and the  
6     Appeals chamber concluded that the Trial chamber was  
7     correct: It hadn't abused its discretion. It said  
8     that, in fact, a retrial will be governed by the  
9     Rules of Procedure and Evidence. If there is a  
10    limitation put on by how much evidence can be  
11    permitted in the trial itself, that direction should  
12    come from the Appeals chamber.

13            Since there had been no direction from  
14    the Appeals chamber, then the conclusion was that the  
15    case would be retried on evidence beyond the two  
16    witnesses' testimony. It was discretionary with the  
17    court. The only limitation on hearing new evidence  
18    in a partial retrial were those imposed by the Rules  
19    of Procedure and Evidence. So that was the case of  
20    Haradinaj.

21            The case of provisional release with  
22    Prlic, now, I have to say that provisional release,  
23    jurisprudence, and practice at the tribunal, kind of  
24    reassembles an amoeba. It depends on when you look  
25

1 at it in the course of time. When the countries of  
2 former Yugoslavia were not cooperating with the  
3 Tribunal, then to secure a provisional release, you  
4 had to show exceptional circumstances.

5 As we progressed along in time, the  
6 countries started to become more amenable and more  
7 responsible, and that exceptional circumstance  
8 requirement left.

9 If we fast-forward now to the time  
10 when we get to Mr. Prlic, Mr. Prlic, who was in -- a  
11 defendant in a multidefendant case that lasted a long  
12 time. Frankly, the trial lasted, I think, over four  
13 years. When the prosecution rested its case, the  
14 defense made a motion for judgment of acquittal and  
15 that motion was denied. So at that point, the --  
16 Prlic asked to be released from custody and his  
17 application was denied.

18 It went up on appeal, and the appeal  
19 said, "Look, in -- after a motion for a judgment of  
20 acquittal, there is a significant change in the  
21 circumstances of this case," and they interpreted  
22 Rule 65 to add a separate component.

23 That component was that there were  
24 sufficient compelling humanitarian grounds to justify  
25



1 the release; for example, my father is dying and I  
2 need to go see him in his last, you know, period of  
3 time, days left on earth. So, you know, they would  
4 release.

5           You know, under those circumstances,  
6 that might be considered a compelling humanitarian  
7 reason. The court would impose a proportionality  
8 component to the release. In other words, okay,  
9 Mr. Accused, you'll be released for four days; you're  
10 not going to be released for six months to go see  
11 your father and, you know, wish him well, you know,  
12 on his journey.

13           What happened then was the trial  
14 ended, and Prlic made an application for -- another  
15 application for provisional release, saying, "Look,  
16 the judgment is going to take a considerable period  
17 of time in this case," and, frankly, it will take a  
18 considerable period of time.

19           So he applied again for provisional  
20 release, and the court considered his application for  
21 release and concluded that, one, he wasn't a threat  
22 to witnesses, victims, or other persons, he wasn't a  
23 flight risk, but they felt bound by the Appeals  
24 chamber decision that there had been no compelling  
25

1 humanitarian reasons, or sufficient humanitarian  
2 reasons, stated, and they denied his request.

3 Now, the criterion that there had to  
4 be sufficient compelling reasons to secure a release  
5 post-98bis or post-trial was very controversial in  
6 the Tribunal. The judges, a lot of the judges,  
7 weren't happy with it, including the Trial chamber  
8 that heard his post-trial application, and they cited  
9 various conventions relating to the right of an  
10 accused to be released and under what circumstances,  
11 but they felt compelled to deny the application,  
12 which they did.

13 MR. SCHEFFER: Can I just jump in, Mark?

14 MR. HARMON: Sure.

15 MR. SCHEFFER: Do we want to emphasize it's  
16 sufficient humanitarian grounds, or is it just  
17 sufficient grounds, because --

18 MR. HARMON: It's sufficient humanitarian  
19 grounds.

20 MR. SCHEFFER: Yeah, because the  
21 humanitarian --

22 MR. HARMON: Compelling humanitarian grounds.

23 MR. SCHEFFER: The humanitarian is what makes  
24 it interesting --

25

1 MR. HARMON: Yeah, I know.

2 MR. SCHEFFER: -- particularly waiting for  
3 judgment.

4 MR. HARMON: Yeah.

5 MR. SCHEFFER: They're saying, "Well, where's  
6 the humanitarian context" --

7 MR. HARMON: I didn't --

8 MR. SCHEFFER: -- "of your request?" Yeah.

9 MR. HARMON: I didn't mean to omit that. It  
10 is sufficient -- it's compelling humanitarian  
11 grounds, is the criterion.

12 Now, having denied that application,  
13 because that was the criterion that was imposed, and  
14 there was great dissatisfaction amongst members of  
15 the court, there was a plenary session of the judges,  
16 in which -- at which time the judges said, "In  
17 provisional release applications, you may consider";  
18 in other words, it was discretionary compelling  
19 humanitarian grounds. That was the amendment to the  
20 rule. It wasn't absolute, it was discretionary.

21 Prlic filed another application to be  
22 released provisionally, and this time the court  
23 granted his application. They said that he's not a  
24 threat to witnesses, victims, or other persons, he's

25

1 not a flight risk. And they then -- but they did  
2 apply a proportionality component to his provisional  
3 release. Specifically they said that Prlic would --  
4 could be released for a period of three months, he  
5 would have to reapply in three months for a new  
6 grant, and he would -- and he could apply while he  
7 was in Zagreb for that release.

8 So that's been the evolution of the  
9 provisional release rules of procedure and  
10 jurisprudence, and it has culminated with this last  
11 set of facts involving Mr. Prlic.

12 Thank you.

13 MR. SCHEFFER: Okay. Thanks.

14 Caroline, do you want to jump in on  
15 any of these particular issues? Then I would like to  
16 go to Iain Morley and Andrew Cayley.

17 Caroline?

18 MS. BUISMAN: Yes. Thank you. Well, on the  
19 provisional release, I don't think I have much to  
20 add. I think it's a good thing that it exists,  
21 because in the ICR, nobody is ever released, and  
22 this, of course, is a big problem also in the ICC.

23 But what I did want -- I wanted to  
24 give a bit of the perspective of the defense on the  
25

1 Haradinaj case. I'm not personally involved with it,  
2 so it's -- but obviously for the defense, this has  
3 raised some problems because -- well, first of all,  
4 the decision was overturned because the Appeals  
5 chamber said that the judges should have given more  
6 time to the prosecution to call these two witnesses  
7 who had refused to testify until then, and so that's  
8 why they reached the -- started the retrial.

9                   But even now, like, the retrial meant  
10 that they could bring in new evidence, they could  
11 recall evi -- witnesses they had already called, or  
12 they could rely on the written testimony. So there  
13 is -- there is all these options, which is, of  
14 course, a bit of a problem for the defense.

15                   But, in addition, until now, the first  
16 still refuses to testify, and the second, it's still  
17 not resolved; we still don't know if he is or he  
18 isn't going to testify, or how. So I just wanted to  
19 make that point.

20                   Yeah. I -- on the other issues,  
21 there's not that much of an agreement -- a  
22 disagreement on the victim participation. It's a  
23 huge budgetary restraint as well. I think this is --  
24 and also when we talk about all these budgetary  
25

1 restraints, they now put the defense and the victims,  
2 the budget for investigations, on the same level,  
3 which I think is not exactly right.

4           There's also -- I think Judge Van Den  
5 Wynngaert, she gave a lecture on this, and apparently  
6 also for the chamber. It's one-third of their  
7 personnel works on victims applications so -- and  
8 obviously for the prosecution and for the defense, so  
9 there is definitely a problem that will in the end be  
10 resolved with time.

11           Thank you.

12           MR. SCHEFFER: Okay. Caroline, thank you very  
13 much.

14           Iain Morley, from the Special Tribunal  
15 for Lebanon, if I might, I would like to take you  
16 back sort of to the early part of 2011, where there  
17 was a ruling with respect to the applicable law for  
18 the Special Tribunal.

19           We've gone through actually some very  
20 interesting issues today for the Special Tribunal.  
21 This sort of takes us back to the fundamental issue  
22 of what law actually governs the Tribunal, and I  
23 didn't want to overlook that, because it is this  
24 interesting mix which you briefly mentioned on --

25

1 about between Lebanese and international law and this  
2 ruling of January 21st, 2011, by the Pre-Trial judge,  
3 Daniel Fransen, well, he was asking for a  
4 clarification of the applicable law, and then the  
5 Appeals chamber -- I'm sorry -- handed down their  
6 decision on February 16th of 2011.

7 Can you comment on how we best  
8 understand how the court will choose applicable law  
9 in its work as it proceeds between -- it's such a  
10 unique court with respect to that issue.

11 MR. MORLEY: The applicable law, the Special  
12 Tribunal for Lebanon, is basically the Lebanese  
13 domestic law, certain codes of the criminal law there  
14 as then framed within the articles of the statute.  
15 It actually says under Article 2 of the statute of  
16 the Special Tribunal for Lebanon,

17 "The following shall be applicable to  
18 the prosecution and punishment of the crimes referred  
19 to in Article 1, subject to the provisions of this  
20 Statute":

21 "(a), The provisions of the Lebanese  
22 Criminal Code relating to the prosecution and  
23 punishment of acts of terrorism, crimes and offences  
24 against life and personal integrity, illicit  
25

1 associations and failure to report crimes and  
2 offences, including the rules regarding the material  
3 elements of a crime, criminal participation and  
4 conspiracy"; and Articles 6 and 7 of what is the 1958  
5 law.

6                   So the applicable criminal law is  
7 quite plainly stated to be the Lebanese Criminal  
8 Code, and specifically particular aspects of it.  
9 Under Article 3, for those of us who are legal  
10 freaks, there is reference to "Individual criminal  
11 responsibility," which embraces a series of modes of  
12 responsibilities of participation or venting which is  
13 framed in international terms. I'll just read it out  
14 for the benefit of the group:

15                   "A person shall be individually  
16 responsible for crimes within the jurisdiction of the  
17 Special Tribunal if that person:

18                   "(a), Committed, participated as  
19 accomplice, organized or directed others to commit  
20 the crime set forth in Article 2 of this Statute";  
21 or, "(b), Contributed in any other way to the  
22 commission of the crime set forth in Article 2 by a  
23 group of persons acting with a common purpose, where  
24 such contribution is intentional and is either made  
25



1 with the aim of furthering the general criminal  
2 activity or purpose of the group or in the knowledge  
3 of the intention of the group to commit the crime,"  
4 which you'll immediately see embraces the notion of  
5 common purpose and elements of joint criminal  
6 enterprise.

7                   Now, bottom line: The law is the  
8 Lebanese Criminal Code. Modes of participation are  
9 expressed to be available under international law.  
10 The consequence of the ruling in February of 2011 was  
11 to clarify what are the elements in the law that  
12 apply as defined by the Lebanese domestic case law,  
13 and also how do international norms or modes of  
14 participation apply within Lebanese domestic law.  
15 And the long and the short of it is basically most of  
16 what we are going to do will be covered by Lebanese  
17 domestic law.

18                   Only where there are lacuna and  
19 difficulties in interpreting the Lebanese domestic  
20 law do we need necessarily to refer to international  
21 law. And where it's still confusing, the general  
22 principle is that we should resolve any confusions in  
23 favor of the defendant.

24                   But overall, I think it's important  
25

1 for people to understand that the Special Tribunal  
2 for Lebanon is a court applying mostly Lebanese  
3 domestic law with a bit of potential tweaking, if  
4 tweaking is necessary, from the international norms.

5 I hope that answers the question as  
6 directly as can be. It's a mixed bag, but it's  
7 primarily, if expressed as a percentage, let's call  
8 it 90 percent. It's 90 percent Lebanese.

9 MR. SCHEFFER: Thank you very much, Iain. We  
10 have a tape change for a few seconds.

11 (WHEREUPON, Disk 5 ended.)

12 Okay. we're on? Okay. I just wanted  
13 to point out in response to Iain's excellent  
14 response, it is important because we certainly  
15 struggle with this issue in the context of the  
16 Extraordinary Chambers in the Courts of Cambodia, the  
17 mixture between Cambodian and international law and  
18 the way in which international law is used to fill  
19 gaps that arise during the practice and jurisprudence  
20 of the court. So it's an interesting comparative  
21 exercise, I think, between the two courts on that  
22 issue.

23 But, first, Diane, you wanted to make  
24 a point about the crime of aggression?

25

1 MS. AMANN: Yes. As I was sitting here  
2 thinking about what hasn't yet been discussed, I  
3 think it's important -- last year's conference, which  
4 covered 2010, would have spent time on what happened  
5 at the Kampala Review Conference, and we haven't  
6 really spoken much about that here.

7 As many of you know, there was a  
8 package of amendments to the Rome Statute that were  
9 adopted at that time by the States Parties by a  
10 consensus vote; there was no recorded vote. They  
11 included amendments to the portion of the statute  
12 dealing with the use of poisonous weapons and other  
13 certain kinds of weaponry which heretofore had only  
14 been prohibited in international armed conflicts,  
15 extending those to noninternational armed conflicts;  
16 i.e., civil wars or internal affairs as well.

17 And then, of course, the big fish in  
18 that package was the amendments necessary to make  
19 fully activated and operational the prosecution,  
20 investigation, and potential punishment of individual  
21 persons for the crime of aggression. So a definition  
22 codified methods to establish jurisdiction over that,  
23 et cetera.

24 It has not fared terribly well yet.

25

1 If you look at the ratification status of the Rome  
2 Statute, I think you'll find that Senegal was the  
3 first country to become a State Party to the Rome  
4 Statute six months after the Rome Conference. By 18  
5 or 24 months after the Rome Conference, which is  
6 about where we are now vis-a-vis Kampala, there were  
7 many, many countries that had ratified, and, of  
8 course, by July of 2002, what, about, four years  
9 after, there were the necessary ratifications for the  
10 treaty to enter into force.

11 So it's quite striking that no country  
12 has bitten onto the aggression package. There has  
13 been one country that ratified a portion of the  
14 Kampala package, and I think that's fascinating. All  
15 it ratified was the piece that extended poisonous  
16 gasses as a prohibition, and that was San Marino. So  
17 the idea that San Marino somehow is thinking twice  
18 and thought the need to bifurcate the crime of  
19 aggression, to sever that from their ratification of  
20 the Kampala package, I -- I can't imagine how that  
21 could be, but, to my mind, that as much as the dearth  
22 of ratifications signals the hesitancy of States  
23 Parties.

24 That said, there appears now to be  
25

1 movement. I have heard rumors, although I can't find  
2 it established on any public notice, that Luxembourg  
3 either has or is about to or very close to ratifying  
4 the Kampala aggression package. There is, as we  
5 speak, now in Berlin a conference ongoing, sponsored  
6 by the German Foreign Ministry. Judge Kaul is among  
7 the participants there. My understanding is most of  
8 the German-speaking States Parties have a presence  
9 there, so Liechtenstein, Austria, et cetera. And the  
10 effort is to try now to jump-start the crime of  
11 aggression package with those countries pledging to  
12 ratify in the next, say, 12 months or so.

13                   And perhaps even more importantly, the  
14 Germans are looking at developing a model statute for  
15 implementation domestically for those countries that  
16 need to do that as a step toward ratification, and it  
17 seems to me that developing that model statute might  
18 actually make it easier for states to envision the --  
19 the interworking of aggression criminality with their  
20 domestic systems.

21                   Not to say that's going to change the  
22 political will, but I think it's worth noting that  
23 after silence that speaks volumes for the last 24  
24 months, there may be now some movement with regard to  
25

1 that innovation.

2 And I'm going to throw it to Sara and  
3 ask what, if any -- what, if any -- if you know,  
4 what, if anything, is being done within the OTP to  
5 anticipate, think about, fear the arrival of that  
6 additional piece of jurisdiction?

7 MS. CRISCITELLI: Boy, to paraphrase Iain, you  
8 know, the people in OTP speak of little else. But,  
9 no, I have not heard a word on that. I think that  
10 that is completely off the radar, at least it's off  
11 of my radar, but I'm just a prosecutor. I don't  
12 know.

13 MR. SCHEFFER: I can just add from my corner  
14 that I raised that question a few months ago and was  
15 told that there simply is not much focus upon it in  
16 OTP right now. They're busy enough on just active  
17 current issues and situations and crises.

18 So, in other words, is there strategic  
19 thinking taking place regarding how to ultimately  
20 achieve that requirement by January 1 of 2017, of 30  
21 ratified states on the crime of aggression in order  
22 to try to activate it for the court?

23 You can't do it before then, but you  
24 can't do it after that unless you have 30 ratified  
25

1 states. That is a -- that's a strategic question  
2 that someone has to be getting on top of, and I'm  
3 not -- as far as I -- I don't under -- I do not know  
4 of any internal process that is grappling with that  
5 at this time within the court.

6           If I may just jump to Andrew Cayley.  
7 Andrew, I know that you've given a lot of thought and  
8 attention to what's called Cases 3 and 4 before the  
9 Extraordinary Chambers, and we would be remiss if we  
10 did not address that because they were prominent  
11 issues during 2011.

12           I don't want to speak to this, but I  
13 want you to. You have talked about in -- I think you  
14 talked about in the context of the internal rules of  
15 the court, that these internal rules encourage you to  
16 inform the public of the work of the Extraordinary  
17 Chambers.

18           And I wondered if you could talk about  
19 that in the context of your view as prosecutor, as  
20 the international prosecutor, of what developed  
21 during 2011 on the issue of Cases 3 and 4, how did  
22 you respond to it, and I know that the judges  
23 responded to some of your responses. If you could  
24 give us just a little overview, it is important to  
25

1 get this on the record, I think.

2 MR. CAYLEY: Yeah. I think in your questions,  
3 David, you describe it as turbulence.

4 MR. SCHEFFER: Yes.

5 MR. CAYLEY: The background to this -- and  
6 there's not much time, I know you want five minutes  
7 for questions -- but when I arrived at the court,  
8 there were two controversial cases, Cases 3 and 4,  
9 which had been commenced by the Office of the  
10 Prosecutor. It's a civil law system, so the Office  
11 of the Prosecutor drafts an introductory submission  
12 outlining the case and then sends that to the  
13 investigating judges who then perform a judicial  
14 investigation.

15 This was a case that had been the  
16 subject of disagreement between the National  
17 Co-Prosecutor and the International Co-Prosecutor.  
18 And under the rules -- and I don't have time to  
19 explain them to you -- but under the system of rules  
20 that was devised where there was this kind of  
21 disagreement and the court could not reach -- it went  
22 to a Pre-Trial chamber where there was this  
23 disagreement and where they could not reach what was  
24 called a super majority; of the judges, the act went

25



1 forward. So there was a disagreement between the  
2 National Prosecutor and the International Prosecutor  
3 on this third and fourth case. It went up, the  
4 judges couldn't agree, the investigation went  
5 forward. But it was a case that was not wanted by  
6 the government.

7 In April of 2011, I was informed by  
8 the co-investigating judges that the investigation in  
9 Case 3 had come to a completion and that I would  
10 receive Notification of Conclusion. The case had not  
11 been investigated; it had simply been shut down to  
12 meet the political imperative of the government under  
13 the rules.

14 And I want to emphasize here, I mean,  
15 this was a very difficult period for the court. I  
16 found essentially refuge and shelter within the law  
17 and the rules. I couldn't get into a lot of the ad  
18 hominem attacks that were taking place in the press  
19 over this. I made it absolutely clear to the press,  
20 to all of my staff: We will simply follow the law  
21 and the rules; that's the only thing we can do here.

22 I had a 15-day window in which to  
23 apply for investigative action by the judges on the  
24 conclusion of the investigation, so I did a rapid  
25

1 review of the case and then filed the investigative  
2 request.

3           At the same time, it had been the  
4 prior practice of the court, of the investigating  
5 judges, to publicize the crimes under investigation.  
6 Why? So that the civil parties could essentially  
7 work out what crimes were being investigated to see  
8 if they were actually affected by these crimes,  
9 whether they themselves were victims or whether they  
10 had relatives that were victims.

11           I also thought that there had also  
12 been previously a convention with -- amongst  
13 investigating judges that they would inform the  
14 public of what they were doing. They had not done it  
15 on this occasion. They deliberately concealed the  
16 disclosure of the crime site, so I went public under  
17 the rules in order that the civil parties would know  
18 what was being investigated so people could make  
19 application, and, secondly, so that the public were  
20 informed.

21           I was immediately threatened with  
22 contempt proceedings. That was subsequently reduced  
23 to an order to retract the statement that I had made  
24 and withdraw it from public domain. I immediately  
25

1     appealed that to the Pre-Trial chamber on a number of  
2     grounds, and that essentially bought me a lot of  
3     time, because it remained in the public domain.

4             I was entitled under the rules to  
5     actually give a summary of the introductory  
6     submission, which the Office of the Co-Prosecutors  
7     had forwarded to the investigating judges to start  
8     the investigation. I did try and stay within that  
9     framework, but, as I say, the investigating judges  
10    ordered me to retract. I applied for a stay of that  
11    order, which I was granted, and then appealed the  
12    decision.

13            The application for investigation that  
14    was made in Case 3 was rejected by the  
15    co-investigating judges on very spurious grounds.  
16    Very aggressive language started to be used in  
17    confidential orders being issued, essentially threats  
18    being made in judicial orders. I wrote a personal  
19    letter to the International Investigating Judge and  
20    asked him essentially to tone the language down  
21    because all of my staff were reading this, and  
22    received back from him a letter, frankly, which I  
23    won't repeat here, but certainly indicated that he  
24    was going to step things up rather than bring the

25

1 temperature down.

2           Eventually, eventually what has  
3 happened -- and I can't go through all of the law --  
4 but there was a lot of, to be frank, bogus law being  
5 used to justify decisions. This is no secret. It's  
6 out there in the public domain, and this was in  
7 response to external pressures to close these cases  
8 down.

9           One of the most disgraceful decisions  
10 that was made was in respect to the Hamill civil  
11 party application. Rob Hamill was a civil party, a  
12 New Zealander, whose brother was abducted by the  
13 Khmer Rouge. He was a young student on a sailing  
14 trip around the Gulf of Thailand. They ended up  
15 drifting into Cambodian waters. He was arrested  
16 along with other people, taken, actually, to S-21,  
17 forced to admit that he was a CIA agent, and was then  
18 burnt alive.

19           And, you know, the damage that this  
20 did in the Hamill family -- you know, obviously I  
21 don't have the time to go into it now -- but, it was  
22 significant. And Hamill had actually been a civil  
23 party, the brother, so the surviving brother; had  
24 been a civil party in Cases 1 and 2. And then in  
25

1 Case 3, he was rejected because the judge found --  
2 and this was the most ridiculous finding I've ever  
3 seen -- that there was no -- that Mr. Hamill's own  
4 psychological injury because of the death of his  
5 brother was not a direct consequence of the crime  
6 committed by Duch; it was a consequence of his  
7 brother's death, which the judge found to be a novus  
8 actus interveniens, a new -- an intervenia. It was  
9 the --

10 (WHEREUPON, there was laughter.)

11 Yes. I know we laugh, but you can  
12 imagine how Mr. Hamill felt about this. It really  
13 was a disgraceful time for the court.

14 That was appealed, and eventually what  
15 has now happened is the International Judge concerned  
16 resigned in October of 2011. We now have a new judge  
17 who has basically gone back through all of this work  
18 of 2011, and he is trying to now remedy all of the  
19 injustices that took place, including in particular  
20 acknowledging that a gross miscarriage of justice was  
21 done in respect of Mr. Hamill, and he's been admitted  
22 as a civil party.

23 But a very difficult year and  
24 certainly a year that makes one reflect on these  
25

1 kinds of courts. Indeed, Professor Greg Gordon has  
2 recently written an article about the challenges  
3 involving these kinds of hybrid courts working  
4 alongside national authorities.

5           It's tough. You're often forced to  
6 stand up in a way that is often very difficult and  
7 often unpleasant, and you're trying to balance that  
8 with actually maintaining relationships with your  
9 national colleagues because you need the court to  
10 work, but you also need to do the right thing. And  
11 that's very hard.

12           And certainly, you know, that form of  
13 justice -- I mean, the ICC will not be able to  
14 prosecute every situation, and, you know, in all of  
15 the situations that we've been -- not in all of them,  
16 but in a number of the situations that we've been  
17 talking about, the issue of national courts -- I  
18 think somebody mentioned the Congo -- with  
19 international support, I think there are many  
20 excellent attributes of these courts.

21           It's local justice, the people are  
22 much more engaged with the courts in the country, but  
23 there also has to be very, very serious consideration  
24 as to how these courts are set up to ensure that

25

1 justice is really done and that the process is  
2 transparent and independent and people are following  
3 the law.

4 Thank you.

5 MR. SCHEFFER: Thank you very much, Andrew.  
6 We have about three minutes left. Would someone like  
7 to ask -- one or two people, ask some final  
8 questions? I'm sure. Yes?

9 MR. POWDERLY: Hi. Joe Powderly again from  
10 Leiden University. I just thought one of the major  
11 developments this year was the failure to confirm  
12 charges in Mbarushimana and in the Kenya case, and,  
13 in particular, in Mbarushimana, the chastisement, I  
14 guess, that was handed down by the Pre-Trial chamber  
15 with respect to the reliance on secondary source  
16 material when trying to confirm charges, it was  
17 something of an issue in Kenya, but not to the same  
18 extent, and I'm just wondering if the panel have any  
19 opinions on the widespread use of secondary ev -- or  
20 secondary material at this stage in the proceedings.  
21 Thanks.

22 MR. SCHEFFER: Thank you very much. In fact,  
23 I'm so glad you brought that up. That's sort of a  
24 gap in my own questioning here that I see I should  
25

1 have raised myself.

2 I suppose, Sara, that is you.

3 MS. CRISCITELLI: I figured if I --

4 MR. SCHEFFER: And also Caro --

5 MS. CRISCITELLI: -- just kind of withered, I  
6 would be --

7 MR. SCHEFFER: No. I know. But I suppose  
8 also --

9 MS. CRISCITELLI: No. I'm kidding.

10 MR. SCHEFFER: -- Caroline, you might want to  
11 weigh in on that as well.

12 MS. CRISCITELLI: All right. We have -- we  
13 were granted leave to appeal and we filed that brief  
14 also this week, last week, something like that.

15 Yes, we were chastised, and we will  
16 see what the Appeals chamber does on the standard and  
17 what you accept at confirmation. It is really  
18 important to understand, though, how complicated it  
19 is to offer nonanonymous statements of witnesses.  
20 What you have to do when you do that is set up a full  
21 system of protection, the equivalent of the Witness  
22 Protection Program.

23 It is a lifelong possibility, it is  
24 expensive, it is disruptive to the lives of the  
25



1 victims, and if you don't know that charges are going  
2 to be confirmed, it is a huge price for the -- the  
3 ASP that funds this, for the office, and for the  
4 witnesses themselves, to have to pay for something  
5 that may not get off the ground. So while there's  
6 obviously an interest at trial in providing the best  
7 evidence if, as the prosecution's theory is the  
8 confirmation is not sort of a testing of the  
9 prosecution's evidence, it is a screen, and as that  
10 screen process develops, it's simply there to  
11 determine whether there's something in this case that  
12 allows it to go forward or whether this is just a  
13 spurious, you know, false set of charges.

14           If you have that system and you're  
15 also taking into account the very serious witness  
16 protection concerns that we face, then you have to  
17 make accommodations, and I know that the defense will  
18 object and does object, and I understand the defense  
19 point of view.

20           The position of the prosecutor -- and  
21 I assume the next prosecutor will adhere to this --  
22 is his view has always been he will give up a case,  
23 he will lose a case, rather than jeopardize a  
24 witness. So, you know, it's a balance, and -- and

25

1 where the balance is drawn, where the lines will be  
2 drawn, is up to the Appeals chamber.

3 This is actually a pretty defining  
4 appeal that is pending on the scope of confirmation,  
5 the nature I evidence that should be presented and  
6 how far it goes, and we'll see how the Appeals  
7 chamber deals with it.

8 So, yes, I recognize the interest of  
9 the defense, I'm not dismissing it, I'm not viewing  
10 them as irrelevant, but it is a balance that has to  
11 be drawn. And in the prosecution's submission, the  
12 balance is drawn on open-source material and however  
13 we can pre -- protect witnesses.

14 Thanks.

15 THE COURT: Caroline, do you want to add a  
16 concluding word on that?

17 MS. BUISMAN: Yes. Thank you. Yes, as you  
18 just said, this is still to be determined by the  
19 Appeals Court, so I don't want to say too much. But  
20 I think it is regret -- at this moment, it's very  
21 unclear for all of us what exactly is the scope of  
22 confirmation. It's not clear what the standard  
23 actually means, it is not clear how far the defense  
24 can actually go in challenging, and this has been

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1 very clear both in Kenya and in Mbarushimana.

2           And what I think is very regrettable  
3 is that we have an appeal for Mbarushimana, but not  
4 for Kenya, because we actually have the same issues.  
5 We also have sought leave to appeal on the scope --  
6 on the scope of the confirmation, and it would have  
7 been very nice if the Appeals chamber could once and  
8 for all settle this issue so we know it for the  
9 future.

10           There is one thing I wanted to add in  
11 the case of Mbarushimana. I think there is also a  
12 second issue. It's not only about sources, because  
13 it's also not only about anonymous witnesses.  
14 Sometimes it's only one report, so it's not even a  
15 witness. But I think the other issue that is the  
16 scope or the exact -- when we talk about a  
17 contribution -- and, again, this is an issue that  
18 came up in the Sang case as well as in Mbarushimana,  
19 and, again, it would have been -- it's regrettable, I  
20 think, that there's a different standard applied by  
21 different courts.

22           So now we have the issue going to the  
23 Appeals chamber to still determine whether a  
24 contribution must be significant, or any  
25

1 contribution. We would have preferred that also they  
2 would have looked into whether or not it should be  
3 substantial. That's what I have to say on this.

4 Thank you.

5 MR. SCHEFFER: And your point, Caroline, would  
6 be that that should be a determination at the  
7 confirmation of charges stage or at the trial stage,  
8 the substantiality issue?

9 MS. BUISMAN: Well, at this moment, it's going  
10 to be the Appeals chamber that's going to look at  
11 this issue, so I think it would be -- once you have a  
12 determ -- an Appeals chamber determination, then --

13 MR. SCHEFFER: Oh, I understand. I just mean  
14 for the future, does that standard have to be met  
15 when the court is convening for confirmation of  
16 charges or for later?

17 MS. BUISMAN: What I -- what I meant to say,  
18 for the standard of confirmation, I think it's very  
19 important that we're clear on it, because at this  
20 moment, some people treat it as a trial and some  
21 people don't.

22 If you don't actually -- because we --  
23 in Katanga, we actually did -- we did not even want  
24 this confirmation hearing. We wanted to raise it and

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1 we couldn't. We were, like, bound to have it for  
2 three weeks and we didn't challenge it, and so then  
3 it delays the whole procedure as well.

4           So maybe we -- this is something,  
5 again, it's all new, this court, and maybe we have to  
6 look into this issue. Maybe there should even be a  
7 choice if you can have a confirmation or not.

8           MR. SCHEFFER: Sara?

9           MS. CRISCITELLI: Just on the nature of the  
10 contribution, the prosecution's position -- and this  
11 is what's up on appeal -- is that the statutory  
12 language governs, and the statutory language  
13 simply -- you know, you have this -- this plan, and  
14 it is terrible, and the person embarks upon or joins  
15 it and knowingly and willfully, all -- all of these  
16 elements. And in the prosecution's view, the statute  
17 which talks about any contribution sets no  
18 qualitative value to it. So it doesn't matter  
19 whether it's confirmation or trial. It is a pure  
20 statutory interpretation question. So the  
21 prosecution's objection was not that the Pre-Trial  
22 chamber prematurely set a requirement, but that the  
23 Pre-Trial chamber set a requirement at all --

24           MR. SCHEFFER: Um-hum.

25

1 MS. CRISCITELLI: -- that is not present in  
2 the statute.

3 MR. SCHEFFER: Very interesting and important,  
4 and we will await the Appeals chamber ruling on this.  
5 I -- well, do we have time for more tape? We have  
6 one student's question.

7 Okay, Greg. Why don't we go with one  
8 last question here by a student that I'll bet you is  
9 from Leiden -- or who is from Leiden.

10 MR. AUDIENCE MEMBER: Yes. My name is Andrew  
11 from Leiden as a guest. My question is perhaps to  
12 the whole panel, and it's in regard to the question  
13 of complementarity, yes, before the ICC in  
14 particular. And I was wondering, once a case is  
15 before the ICC, is it generally biased towards  
16 keeping the case? I have in mind, for example,  
17 Kenya, where the government has done the issue of  
18 complementarity.

19 I would -- of course, now looking in  
20 hindsight, they say same person, same conduct. And  
21 that had been mentioned earlier. Is it a question  
22 that's open to the court to say that same person,  
23 same conduct, but we give you one year? If you  
24 wouldn't have done this, then we take it back. I

25

1 think this is complementarity, to my mind.

2           The same thing happened -- well, not  
3 exactly the same thing -- but with Uganda, where they  
4 could not really negotiate with -- coming to Kony  
5 2012 -- they couldn't really negotiate with Kony  
6 because, of course, once the case is with the ICC,  
7 the ICC will not -- at least it appears -- will not  
8 let it go. So I don't know.

9           My question really is: Is there an --  
10 is there any room for the ICC to let go of a case in  
11 that kind of language?

12           MR. SCHEFFER: Well, Sara, do you want to try  
13 that?

14           MS. CRISCITELLI: Yeah. And here -- here's my  
15 personal view. I'm clearly not speaking for the  
16 office or the judges, because I don't -- these all  
17 unsettled.

18           My personal view is that it is a good  
19 thing to encourage national action, and even if you  
20 have only encouraged national action by starting an  
21 ICC case, and the national authorities suddenly go,  
22 "Oh, crap, they're serious; this is -- you know, we  
23 can't avoid this anymore, let's get moving," then  
24 maybe that is what the statute is about, and maybe

25

1 that's the kind of thing that we ought to be doing.

2           Whether judges having invested a lot  
3 of time and energy in a case are going to be willing  
4 to give it up, I can't -- you know, that's -- there's  
5 a sort of personal investment in the case and that  
6 may counsel against judges wanting to do it.

7           And the second thing is that maybe the  
8 country is not going, "Oh, crap, they're serious,  
9 let's get moving," the country is going, "Oh, crap,  
10 they're serious, let's see how we can stop this by  
11 creating a sham investigation." So it's very, very  
12 difficult to make these kinds of judgments, and it's  
13 not an easy thing for the prosecution or the court to  
14 evaluate.

15           In principle, I think it's certainly  
16 appropriate for the state to act poor when it knows  
17 that we're investigating, but if, like, in Kenya, it  
18 comes forward after all of this is done and does the  
19 "Oh, crap, let's get moving" reaction, if it is a  
20 genuine, legitimate reaction, then I think it ought  
21 to be respected. But the question is testing the  
22 genuineness and the legitimacy of the reaction. And  
23 that's my personal view.

24           MR. SCHEFFER: Hassan, did you want to add

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1 just one point? And then we really must conclude, I  
2 am afraid.

3 MR. JALLOW: Thank you. Well, we -- I mean,  
4 the ad hoc tribunals, we are not based on  
5 complementarity, but on primacy. But at the end of  
6 the day, we do discover that we can't do it, all of  
7 it, by ourselves, so we've had to resort to the 11bis  
8 process in order to transfer what we have. So it is  
9 possible for the tribunal to let go of what it has,  
10 and I suppose even the ICC will be able to do that.  
11 We will be letting go of cases that are already with  
12 us of detainees who are already in our custody.

13 The second point is that the -- I  
14 think our experience with regard to the 11bis,  
15 particularly in the case of Rwanda, is a point that  
16 needs to be done if complementarity itself is to work  
17 well.

18 We've had to actively engage the  
19 Rwandans, for instance, in law reform, in capacity  
20 building, to make sure that the -- the legal free  
21 work and also the court system and the political  
22 will, also, all of those are in appropriate -- all  
23 those are able to guarantee a fair trial to our  
24 detainees when they are transferred there.

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1                   So I think that's the second important  
2 thing, that, I think, the lessons to be -- that can  
3 be drawn from the Rwandan case is that for  
4 complementarity to be successful, the ICC also may  
5 need to actively engage in making sure that the legal  
6 systems in those countries are -- are improved in a  
7 way that can make them able to receive and manage  
8 these cases properly.

9                   We have been finally able to refile  
10 last year, as we mentioned, the case of Uwinkindi,  
11 and one other case this year, because we managed to  
12 get the Rwandans to -- to amend their laws, to  
13 abolish the death penalty, to provide the fair trial  
14 guarantees that are now a statute, to provide -- to  
15 create witness protection services which are  
16 efficient and will guarantee, you know, protection  
17 both for prosecution and defense witnesses, et  
18 cetera. I think these are all indicators as to what  
19 needs to be done as part of a complementarity regime.

20                   Thank you, David.

21                   MR. SCHEFFER: Than you. Thank you, Hassan.

22                   You're looking at me, Fidelma. Okay.

23                   MS. DONLON: Yeah. I would like to --

24                   MR. SCHEFFER: Okay.

25

1 MS. DONLON: -- just very quickly follow up --

2 MR. SCHEFFER: Yes.

3 MS. DONLON: -- and it's a follow-up from  
4 Prosecutor Jallow's point on Rule 11bis. I think  
5 it's only fair in any conversation about  
6 complementarity that we also look towards the  
7 Yugoslavia tribunal and the years of coordination  
8 between the Bosnian authorities, the international  
9 community, and the ICTY to set up the Bosnian War  
10 Crimes Chamber, which resulted in the referral of ten  
11 accused persons for trial to the chamber.

12 And, in addition to that, it actually  
13 kick-started a national process where upwards of 70  
14 other people have been indicted by the National  
15 Prosecutor. Not a system without its flaws, none of  
16 them are, but I think that it is appropriate that  
17 when we look at complementarity regimes, that  
18 certainly that's a model as well to be considered in  
19 addition to the 11bis process with Rwanda.

20 Thank you.

21 MR. SCHEFFER: Thank you very much, Fidelma.

22 We at times in the past actually  
23 focused on the Court of Bosnia and Herzegovina or the  
24 War Crimes Chamber, and this year, I just felt I had

25

1 a full-enough table, but it is a court that we always  
2 have to keep our eye on because it's doing tremendous  
3 work in Sarajevo at a national level on these crimes.

4 I want to thank everyone here for  
5 their attendance, I also want to thank the Special  
6 Tribunal for Lebanon for hosting us today.

7 I again want to thank everyone at  
8 Northwestern, including my students who prepared so  
9 many preparatory documents for this conference, also  
10 Phil Sandick here for his assistance; Virginia  
11 Richardson back in Chicago -- I want to get all these  
12 names on the record -- and Gregory Townsend who  
13 really -- Greg, you deserve our applause. We're  
14 going to applaud Greg.

15 (WHEREUPON, there was applause.)

16 Thanks so much, everyone. This will  
17 ultimately -- the tape will be posted on the web site  
18 of Northwestern University School of Law under the  
19 Center for International Human Rights. You'll see a  
20 way to, you know, navigate to get to it ultimately.

21 And, as I say, there will be a special  
22 edition of the Northwestern Journal of International  
23 Law probably out by September, which will have an  
24 abridgement of this transcript as well as various

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1 articles of relevance relating to our discussion  
2 today. So thank you all very much.

3                   And now there's a tour of the  
4 courtroom. For those of you who are interested,  
5 follow Greg; is this correct? Greg is the tall guy  
6 right in the back there (indicating). He's currently  
7 sitting -- now he's standing, and he will guide you  
8 to the courtroom and show it to you. Thank you all  
9 very much.

10                                   (WHEREUPON, Disk 6 ended.)

11                                   (Which were all the proceedings  
12                                   had in the above-entitled cause.)

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1 STATE OF ILLINOIS )

) ss:

2 COUNTY OF C O O K )

3

4

5 I, CARMELLA T. FAGAN, a Certified  
6 Shorthand Reporter and Registered Professional  
7 Reporter doing business in the City of Riverside,  
8 County of Cook, and State of Illinois, do hereby  
9 certify that I reported in computerized shorthand the  
10 foregoing proceedings of said conference as appears  
11 on provided DVDs so recorded on the 14th day of  
12 March, 2012.

13 I further certify that the foregoing  
14 is a true and correct transcription of my shorthand  
15 notes, and contains all of the proceedings had at  
16 said conference on provided DVDs.

17 In testimony whereof, I have hereunto  
18 set my hand and affixed my notarial seal this \_\_\_\_\_  
19 day of \_\_\_\_\_, 2012.

20

21 \_\_\_\_\_

22 Carmella T. Fagan, C.S.R., R.P.R.

23

My notary expires:

24